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v.
Burlington Northern, Inc., et al.

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Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Bizar, Irving

Counsel for respondent: Payson, Robert K., Cherno, Marc P.

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1	Jun 26 1984	G	Petition for writ of certiorari filed.
2	Jul 26 1984		Brief of respondents Burlington Northern, et al. in opposition filed.
3	Aug 1 1984		DISTRIBUTED. September 24, 1984
4	Aug 16 1984	X	Reply brief of petitioner Barbara R. Schreiber filed.
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6	Nov 14 1984		Joint appendix filed.
7	Nov 14 1984		Brief of petitioner Barbara R. Schreiber filed.
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13	Dec 15 1984	X	Brief of respondents Burlington Northern, et al. filed.
14	Jan 2 1985	X	Reply brief of petitioner Barbara R. Schreiber filed.
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83-2129

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

– against –

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR. and L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J.R. HUBBARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S SUPPORTING BRIEF

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QUESTIONS PRESENTED

1. Does Section 14(e) of the Williams Act prohibit manipulative acts, even though the manipulator discloses those acts after they occur, at a time when it is too late to have the market freely react and for the victims of the wrongful acts to take corrective market action?

2. Did a manipulative act occur when the maker of a tender offer (i) for the sole purpose of protecting the target company insiders at the expense of tendering shareholders, wrongfully withdrew that offer, which had been opposed by the insiders, after it had been fully subscribed for, pursuant to an agreement between the maker and the target company insiders and (ii) immediately thereafter make a substituted tender offer on the same terms and conditions as the previous offer, allowing those insiders to tender their own target company shares while those who previously tendered all their

shares would now have those shares significantly reduced under the new offer?

3. Whether the remedies of those who tendered and were injured can be left to conflicting and inconsistent remedies of various states and whether any such remedy is not precluded?

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IN THE
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October Term, 1984

BARBARA R. SCHREIBER,

Petitioner

- against -

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S SUPPORTING BRIEF

OPINIONS BELOW

The decision of the United States District Court for the District of

Delaware is reported at 568 F.Supp. 197. The decision of the United States Court of Appeals for the Third Circuit, affirming said judgment, is not yet officially reported, but is reported in CCH Fed. Sec.L.Rep. [Current Transfer Binder] par. 91,407 (1984). The decisions of the Third Circuit and of the District Court are set forth in Appendix A.

JURISDICTION

This Petition for Certiorari is filed pursuant to 28 U.S.C. §1254(1). Federal jurisdiction was invoked in the United States District Court, under Section 27 of the Securities Exchange Act of 1934, as amended, 15 U.S.C. §78aa, and the principles of pendent jurisdiction. The decision and judgment of the District Court dismissing the complaint was timely appealed, to the Third Circuit. The Third Circuit affirmed on April 2, 1984.

Constitutional And Statutory Provisions Involved

The Commerce and Supremacy Clauses of the United States Constitution and the

Fourteenth Amendment of the United States Constitution and Section 14(e) of the Williams Act, are set forth in Appendix B.

STATEMENT OF THE CASE

This action arises out of a tender offer, its wrongful cancellation after it had been fully subscribed for, and the reissuance of a revised tender offer, identical with the prior offer, under circumstances and terms favoring target company management to the injury of the original tenderors. **

On December 21, 1982, defendant Burlington Northern, Inc. through its wholly owned subsidiary, R-H Holdings Corporation ("Burlington" hereinafter), made a hostile tender offer (the

**Respondents never answered the complaint; their motion to dismiss thus assumed the truth of its substantive allegations. Those allegations are the basis of the facts submitted herein and were the basis on which the Courts below acted.

"December tender offer") for 25.1 million shares of stock in El Paso Gas Company ("El Paso") for $24 per share ("the December offer") which, if accepted, would give them majority control of El Paso. The December offer, which provided certain "outs" by which it could be terminated (which the complaint claims were inapplicable at bar), had a deadline of December 30, 1983. On December 29, 1982, the plaintiff-appellant tendered her El Paso shares in response to the December tender offer; by the December 30, 1983 deadline, the December tender offer was fully subscribed and Burlington had majority control of El Paso.

The El Paso management had urged rejection of the December tender offer, asserting that the amount was inadequate; management made a number of defensive moves to resist the December tender offer, including commencing and losing one litigation and was about to lose another in the Delaware Chancery Court. However, after the December 30, 1982 deadline had passed and it was clear that Burlington had succeeded in its December tender offer and litigation had failed,

the El Paso management entered into private negotiations with Burlington. As a result of these negotiations, which were not disclosed at that time to the tenderors, the December tender offer was rescinded and cancelled and a revised offer submitted.

The revised tender offer (the "January offer") coming immediately after the cancelled December offer provided for a new tender offer in which Burlington would only have to acquire 21 million shares of El Paso's stock at $24 per share, rather than the 25.1 million shares in the December offer. Options to acquire additional El Paso stock were given to Burlington and El Paso stock was also sold to Burlington. The January offer, although it involved payment of the same price to the shareholders that the El Paso management had previously recommended be rejected as "inadequate", was now approved by that management.

A number of parties clearly benefitted from the cancellation and reissuance of the Burlington tender offer. Clearly Burlington benefitted,

because it acquired control of El Paso. El Paso management clearly benefitted by being able to tender their own El Paso shares which they previously had not done. Moreover, Burlington "locked up" El Paso since the accepted December offer blocked other offers and artificially impacted the market price since that price rose to meet the tender offer. By cancelling the December offer and immediately resubmitting the revised offer, bolstered by option and stock sales with a new short tender period, respondents made sure that no one else could intervene with a better offer and the market could not freely seek its own level.

The shareholders and investors in the marketplace who, in defiance of El Paso's management recommendations, had tendered their shares under the December offer before the December 30, 1982 proration deadline, were damaged by the manipulation of the tender offer; they were required to retender their shares along with all other El Paso shareholders in the January offer, and their shares

which previously had been fully tendered became subject to extensive proration because the January offer was for considerably fewer shares than the December offer. Moreover, the El Paso shareholders had no other place to sell their shares. During the interval when the first offer was accepted, no one else would make a tender offer. Then and now, the marketplace reflected the fact that Burlington controlled El Paso and the El Paso stock would sell for less than its true value.

The Courts below rejected petitioner's action because they found that respondents had made disclosure of their "wrongful" acts at or about the time of the second tender offer. The Third Circuit arrived at its conclusion, notwithstanding its comment

> Of special concern to us are Schreiber's averments that El Paso management breached its fiduciary duty to stockholders when it negotiated such self-serving arrangements as the golden parachutes. Nontheless, in the wake of Sante Fe's instruction that "once full and fair disclosure has occurred, the fairness of the

> transaction is at most a tangential concern of the statute, 430 U.S. at 477-78, we are constrained to hold, until Congress directs otherwise, that shareholders like Schreiber must rely on the remedies provided by state law. (Footnotes omitted.)

The Courts below concluded that Section 14(e) is a "disclosure" statute and nothing more.

Subsequent to petitioner's commencement of the instant litigation, actions were brought in the Delaware Chancery Court for breaches of contract and fiduciary duty against the same respondents. There, upon respondents' consent, the actions were certified ex-parte as class actions and without notice to class members. The existence of these suits -- as we will show below -- in no way affects petitioner's claims or this petition.

REASONS FOR GRANTING THE WRIT

1. This case affords this Court an opportunity to decide a question not previously ruled upon by this Court, and which has been the subject of division

among the Circuits and intense scholarly debate.

As noted above, the crux of Third Circuit holding is that Section 14(e) is directed to disclosure and nothing more. The Sixth Circuit, in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), cert. denied 455 U.S. 982, 102 S.Ct. 1490 (1982), held that the absence of deception is not a requirement of Section 14(e) in prohibitting manipulative acts in connection with a tender offer.

The Ninth Circuit, in Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, 1086 (9th Cir. 1982) adopted the Sixth Circuit's approach.

The Second Circuit, on the other hand, has stated, in Buffalo Forge Co. v. Ogden Corp. 717 F.2d 757 (2nd Cir. 1983), cert. denied, _____ U.S. _____ 104 S.Ct. 550 (1983) and Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1 (2nd Cir. 1983), cert. denied, _____ U.S. _____ (1984), that Section 14(e) deals only with disclosure and to constitute a violation of that

section an element of deception must be present. The Third Circuit in the instant case has thus aligned itself with the Second Circuit, rather than with the Sixth and Ninth Circuits.

The question of whether Section 14(e) covers manipulative acts or requires deception and non-disclosure for its violations is of significant importance. Indeed, Section 14(e) and its full reach have often been the subject of significant scholarly debate. The following is only a partial list of such writings:

H.Bloomenthal, Lock-Ups - Mobil Wins Battle; Loses War, 4 Securities & Federal Corporation Law Report 97 (1982); G.Brunelle, Using the Lock-Up to Defend Against a Hostile Tender Offer - When Is It Manipulative?, 11 Securities Regulation Law Journal 76 (1973); R.DeLaMater, Target Defensive Tactics as Manipulative Under Section 14(e), 84 Columbia Law Review 228 (1984); S.Hochman, Marathon Revisited: A Review of the Post-Marathon Cases Involving Defensive Responses to Tender Offers

Alleged to Be Manipulative Despite the Absence of Deception, 16 Review of Securities Regulations 923 (1983); M. Lowenstein, Section 14(e) of the Williams Act and the Rule 10b-5 Comparisons, 11 Georgetown Law Journal 1311 (1983); Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law be Mobilized to Overcome the Business Judgment Rule? 8 Journal of Corporation Law 337 (1982); R. Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Southwestern Law Journal 975 (1982), reprinted in 25 Corporation Practice Comment 335 (1983); L. Rachford, Takeover Developments - Defining Tender Offers and manipulation Under the Williams Act, 40 Washington and Lee Law Review 1199 (1983); V. Rosenzweig, The Legality of Lock-ups and Other Responses of Directors to Hostile Takeover Bids or Stock Aggregations, 10 Securities Regulation Law Journal 291 (1983); H. Silberberg and D.Pollack, Are the Courts Expanding the Meaning of Manipulation Under the Federal Securities Laws? 11 Securities Regulation Law Journal 265 (1983); E. Weiss,

Defensive Responses to Tender Offers and the Williams Act's Prohibition Against Manipulation, 35 Vanderbilt Law Review 1087 (1982); Note, Target Defensive Tactics Under Section 14(e), 84 Columbia Law Review 228 (1984); Note, Tender Offers, Lock-ups and The Williams Act: A critical Analysis of Mobil Corp. v. Marathon Oil Co., 21 Duquesne Law Review 669 (1983); Note, Section 14(e) of the Williams Act: Can There be Manipulation With Full Disclosure Or Was The Mobil Court Running on Empty? 12 Hofstra Law Review 159 (1983); Note, Securities: Lock-up Options Employed by Target Corporations as a Defensive Technique to Unwanted Takeovers, 58 Notre Dame Law 926 (1983); Note, Tender Offeror's Right to Injunctive Relief Recognized, 3 Pace Law Review 711 (1983); Note, The Future of Lock-ups After Mobil v. Marathon, 27 St. Louis University Law Journal 261 (1983); Note, Hostile Tender Offers and Injunctive Relief for 14(e) Manipulation Claims Developments After Mobil Corp. v. Marathon Oil Co., 40 Washington and Lee Law Review 1175 (1983); Note, Swallowing

the Key to Lock-ups Options, 14 University of Toledo Law Review 1055 (1983).

The financial news are replete daily with constant references of hostile tender offers. Involvements in hostile tender offers are costly. Bids must be analyzed, financing arranged, counsel retained and used, filings and challenges to filings prepared, and disputes with stockholders resolved, all of which require time, effort and money. Litigation frequently ensues. Thus, the issue at bar now clouded with uncertainty, depending in which Circuit the matter arises, impacts on all this activity and is therefore wide reaching.

This Court has already suggested, in Edgar v. Mite Corp., 457 U.S. 624, 73 L.Ed.2d 269 (1982) the need to clarify the reach of the Williams Act. While it is true that this Court declined certiorari in Datatab and Buffalo Forge, both those cases did not present the factual opportunity to deal with the question. In Buffalo Forge, supra, the suit involved the refusal of the victor

of a tender offer to permit the target company to comply with an option granted by prior management to a "white knight". In Data Probe supra, the allegedly improper option had been granted after a merger had been agreed to between the target and another, and before the "white knight" had made a tender offer.

Accordingly, it is respectfully submitted this case requires that certiorari be granted.

2. We respectfully submit that Section 14(e) prohibits manipulation without requiring an element of deception. In short, we submit that the rationale of the Sixth Circuit in Mobil Corp. v. Marathon Oil, supra, applies and is the appropriate rule.

Section 14(e) of the Williams Act provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any

> tender offer or request or invitation for tenders, or any solicitation of securities holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

The foregoing language clearly indicates two types of prohibitions: (i) deception and disclosure and (ii) manipulative acts and practices. The use of the conjunctive "or" as opposed to "and" following the directive "it shall be unlawful for any person", inescapably leads to the foregoing conclusion. That conclusion is underscored by the mandate that the Commission "prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive or manipulative" (emphasis supplied).

If Congress intended deception to be the sole prohibition, it would simply have placed a period after the words "fraudulent, deceptive...acts or practices". It would not have added the

disjunctive "or" and "the manipulative acts". This Court has always recognized that the plain language of the statute is to be obeyed and deferred to as opposed to some perceived intent or gloss based upon a belief as to Congressional desires. Thus, in Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, fn.19, this Court stated:

> "To let general words draw nourishment from their purpose is one thing. To draw on some expressed spirit outside the bound of the normal meanings of words is quite another.... After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." Addison v. Holly Hill Fruit Products, Inc., 322 U.S., at 617-618, 88 L.Ed. 1488, 64 S.Ct. 1215, 153 A.L.R. 1007. See Frankfurter, Some Reflections on the Reading of Statutes, 47 Col.L.Rev. 527, 536-537 (1947).

Accord, Jefferson County Pharmaceutical Association, Inc. v. Abbott Laboratories, et al., _____ U.S. _____, 74 L.Ed.2d 882 (1983); Tennessee Valley Authority v. Hill, 437 U.S. 153, 57 L.Ed.2d 117 (1978).

While this Court has never considered the question of manipulative acts in the Williams Act context, it has considered somewhat similar constructions for Section 10(b).

In Ernst & Ernst v. Hochfelder, 425 U.S. 185, 47 L.Ed.2d 668, 96 S.Ct. 1375 (1976), the Court established that the word "manipulative", as used in Rule 10b-5, referred to intentional or willful conduct rather than simple negligence. 425 U.S. at 199. In Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 51 L.Ed.2d 480, 97 S.Ct. 1292 (1977), the Court held that a breach of fiduciary duty, without deception, was not a violation of Rule 10b-5. However, the Court went on to say:

> It is also readily apparent that the conduct alleged in the complaint was not "manipulative" within the meaning of the statute.
>
> * * *
>
> No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices.

430 U.S. at 476-77 (emphasis added).

These cases indicate that a "manipulative act" is separate and independent from violations stemming from nondisclosure. Although manipulative practices may often include an element of deception, this Court has never held that, as with breaches of fiduciary duty, an element of deception is required.

The legislative history of the Williams Act is not inconsistent with the concept of prohibiting manipulative acts without the elements of deception. While specific Congressional statements can be found addressed to the questions of deception and disclosure, these statements do not preclude manipulation existing as a separate wrong. Otherwise, Congress would not have added the disjunctive "or" and then "manipulative acts". In fact, in its outline of the Securities Exchange Act's organization, the Committee on Interstate and Foreign Commerce stated:

> Tne chief provisions of the bill may be grouped under six headings: (a) control of credits; (b) control of manipulative practices; (c) provision of adequate and honest reports to securities holders by registered

> corporations; (d) control of unfair practices; and (e) control of exchanges and over-the-counter markets; (f) admininstration.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934) (emphasis added). It is clear, therefore, that the Securities Exchange Act is directed at much wider purpose than mere disclosure. The House Reports discussing the bill refers to the multitude of abuses which the bill was intended to cure:

> To reach the causes of the "unnecessary, unwise, and destructive speculation" condemned by the President's [Franklin D. Roosevelt] message, this bill seeks to regulate the stock exchanges and the relationships of the investing public to corporations which invite publlic investment by listing on such exchanges.

H.R. Rep. No. 1383, supra, at page 2. If, indeed, there is any single overriding purpose evident from the legislative history of the Securities Exchange Act of 1934, it is the protection of the public investor. As President Roosevelt wrote to Congress during consideration of the Act in 1934:

> I therefore recommend to the Congress the enactment of legislation providing for the regulation by the Federal Government of the operations of exchanges dealing in securities and commodities for the protection of investors, for the safeguarding of values, and, so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation.

Letter of President Franklin D. Roosevelt, H.R. Rep. No. 1383, supra, page 2. (Emphasis added.)

Nothing in the Williams Act history suggests that §14(e) was to be read inconsistently with the foregoing.

Similarly, it is plain that the Williams Act has as its overriding purpose the protection of investors:

> Congress was indeed committed to a policy of neutrality in contest for control, but its policy of even-handedness does not go either to the purpose of the legislation or to whether a private cause of action is implicit in the statute. Neutrality is, rather, but one characteristic of legislation directed toward a different purpose - the protection of investors. Indeed, the statements concerning the need for Congress to maintain a neutral posture in takeover attempts are contained in

> the section of the Senate Report entitled: "Protection of Investors." Taken in their totality, these statements confirm that what Congress had in mind was the protection of shareholders, the "pawn[s] in a form of industrial warfare."

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29-30, 51 L.Ed.2d 124, 97 S.Ct. 926 (1977).

This Court stated that the Williams Act is "intended to protect investors" and "avoid favoring either management or the takeover bidder". Edgar v. Mite Corp., supra, 457 U.S. at 633.

Based on the foregoing, we submit the Williams Act clearly prohibits manipulative acts or practices in the absence of deception in accordance with the statute's unambiguous language.

The Third Circuit in the instant case, as did the Second Circuit in the Datatab and Buffalo Forge cases, relied upon the analysis of Section 10(b) and the cases construing that section to justify the claim that Section 14(e) is limited to disclosure consideration. We

submit that such a disposition rests on a mistaken assumption that an analysis of Section 10(b) applies to Section 14(e).

Section 10(b) is directed to insuring informed investment decisions through a regulation of trading markets which would require disclosure and prohibiting deception and classic kinds of market manipulations. See, e.g., Weiss, Defensive Responses to Tender Offers and The William Act's Prohibition Against Manipulation, 35 Vanderbilt Law Review 1087, 1092 (1982). On the other hand, the William Act is addressed to the narrower and more specific problem of "protection of investors who are confronted by a cash tender offer". Piper v. Chris-Craft Industries, Inc., supra, 430 U.S., at 35.

Tender offer battles, even in the context of full disclosure, create extreme pressures and frequently involve tactics which distort and artificially effect the market and the investment decisions.

The Third Circuit's refusal to accept manipulative conduct -- without deception

-- as a separate wrong because it would ultimate require "that the federal courts supervise the substantive fairness of practially all tender offers..." poses the wrong issue. The case at bar and other manipulation cases do not concern fairness. They deal with the fact that the particular defendants have prevented a free market by various means.

In sum, we submit that the Williams Act is concerned with complete disclosure and a free market which can properly react to such disclosure. If defendants prevent the market from freely acting, not because they have offered an unfair price, but through other devices, it helps no investor to have complete disclosure. The investor has no place to go with the information.

The case at bar does not involve the mere revision or renegotiation of a pending tender offer; it does not involve a claim of mere breach of fiduciary duty. This is a case where the deadline for proration of the tender offer had passed, with the offer being fully subscribed. The Burlington tender offer

had run its course, and Burlington had won. The market price of El Paso stock duly reflected that. No one else would tender for El Paso. Those who had subscribed had no place else to go. It was only then, after the tender offer had become a "fait accompli" that the El Paso management entered into negotiations with Burlington. Thus, in effect, the El Paso management and Burlington were playing a "heads I win, tails you lose" scheme. El Paso rejected the December tender offer and resisted the takeover bid of Burlington. Obviously, if El Paso had succeeded in resisting the tender offer, no further negotiation would have ensured. But since they lost, El Paso management and Burlington simply entered into an agreement which manipulated the already fully subscribed tender to comport with their own personal interests. By doing so they substituted their own self-serving agreement for the one chosen by the tendering shareholders. Surely, the disclosure of El Paso's private agreement with Burlington <u>after</u> the fact cannot remedy

the injuries suffered by the shareholders who had tendered their shares in the December offer. The disclosure provisions of the security laws, meant to permit shareholders to make intelligent investment decisions, can be of no use when shareholders are faced with no alternative but to accede to management's will. The Sixth Circuit in <u>Mobil Corporation v. Marathon Oil Co.</u>, supra, observed the same discrepancy.

> It may be that the Marathon shareholders in this case have now been fully informed that their management granted USS the Yates Field option and the stock option. They may now understand fully how these options deter any tender offers higher than $125 per share. <u>Yet, they have had no real alternative to accepting the USS offer</u>, because Mobil's offer of $126 is conditional upon the invalidity of the options, and there is and could be no other comparable tender offer as long as the "lock-up" options remain in effect.

669 F.2d at 376-77. [Emphasis added.]

There is yet another reason that the decision of the Court below should not stand. In a "heads I win, tails you lose" scheme in which management can play

both sides of the field, the carefully balanced scales between management of the target firm, the tender offeror, and the shareholders and investors become weighted against the shareholders and investors. There is no longer any impetus for a tender offer to the target company shareholders to be carried out. Management and the offeror can simply wait it out to find out whether the hostile tender offer will succeed. If it does not, target company management is spared from making any actions; if the hostile tender offer does succeed, as here, then, <u>after the fact</u>, the target company management can approach the offeror with terms favorable both to themselves and to the offeror. There is no free market and no room for any other bids.

The District Court below maintained that, should defendants' actions be considered "manipulation" under Section 14(e), "then potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated." (Appendix B). That simply misconstrued

the thrust of the complaint. It is not contended that a tender offer, even the one at issue, can never be revised or withdrawn once made. Nor does plaintiff-appellant assert that every action which affects the marketplace is manipulative. What makes the facts of the instant action manipulative is that the cancellation and reissuance of Burlington's tender offer (i) occurred <u>after</u> the offer had run its course and been fully subscribed and become legally binding; and (ii) served no purpose other than enabling El Paso's management to protect themselves; (iii) enabled Burlington to continue its control; (iv) locked out competing bids and prevented the marketplace from functioning; all at the expense and to the injury of El Paso's shareholders and investors.

3. The Third Circuit referred to the existence of subsequently commenced state court actions (in Delaware Chancery) and no doubt respondents will also claim here that the subsequently commenced suits will provide all necessary relief. We disagree.

In the first place, the state court actions do not and cannot encompass the federal claims.

Secondly, it is clear from the conduct of those state cases that there is substantial, questions concerning collusion between the litigants. Thus, for example, class status has been voluntarily stipulated to ex-parte. No notice has been given to the members of the class who might wish to "opt out" or seek new class representation because the present putative representative is inadequate.

Thirdly, there are significant constitutional questions in permitting a state class action to encompass nationwide members, when the jurisdictional basis for the class suit is that the corporation or corporations involved are organized in Delaware but non-Delaware citizens having no Delaware contact are now members of the class without notice of its existence or an opportunity to opt out or otherwise participate and have their rights completely adjudicated. It is submitted

that such procedure violates the 14th Amendment of the United States Constitution.

Lastly, relegating the injured parties to state court actions allows each state to fashion inconsistent remedies and relief or no remedy. One state may permit respondents the alleged outs (which the complaint claims is not applicable), while other states may affix liability for an entirely different reason. Each state may have an entirely different measure of damage. Some states may have statutes which purport to regulate defendants' conduct. To allow such inconsistent state action to overlap the tender offer area covered by the Williams Act, leads to extraordinary burdens not only upon interstate commerce in securities transactions caused by tender offers, but an interference with the regulatory scheme encompassed by the Williams Act. Such a result is inconsistent with the thrust of this Court's holding in Edgar v. Mite Corp., supra, 457 U.S. 624, 73 L.Ed.2d 269. Furthermore, as the A.B.A Subcommittee on

Proxy Solicitations and Tender Offers observed:

> It is clear that the existing mottled pattern is at best confusing and may even create outright conflicts of regulatory patterns by multiple states asserting a right to regulate a given transaction. For example, a tender offer for shares of a Delaware corporation with its principal place of business in Ohio and substantial portions of its assets in both Ohio and Indiana might be subject to the takeover laws of all three states. The hearings which could be required in Ohio and Indiana could produce a delay in effectiveness that might collide with the Delaware requirement that the tender offer be made not less than twenty nor more than sixty days after delivery of a statement of intent to make the offer. Such conflicts also permit a regulatory gap in the prohibition of manipulative acts or practices or may even deter mutually beneficial tender offers.

A.B.A Subcommittee on Proxy Solicitations and Tender Offers, Federal Regulation of Securities Commmittee, State Takeover Statutes and the Williams Act, reprinted at 32 Bus.L. 186 (1976); Accord, Edgar v. Mite Corp., supra, 457 U.S. 624, 73 L.Ed.2d 269.

Without federal control over manipulative acts or practices, the free flow of market forces will also be restricted. See, e.g., Wilner and Landy, The Tender Trap: State Takeover Statutes And Their Constitutionality, 45 Fordham L.Rev.1 (1976).

To avoid the burden of the differing and inconsistent state treatment of a single tender offer and the disputes arising thereunder, the Williams Act should be given its full force and effect. It is only through this Act that the adverse impact on interstate commerce can be avoided. This Court should prohibit the regulation of manipulative acts or practices by the states and give full effect to the federal statute to regulate for the purpose it was designed.

The objectives of the Williams Act must be met via the statute Congress enacted to achieve such objectives with the need for uniformity in regulating manipulative and deceptive acts or practices never greater.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1504

BARBARA SCHREIBER,

Appellant

v.

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M. R. ENGLER, JR., W. C. HENDERSON, R. S. MORRIS, M. A. EHRLICH, A. M. DERRICK, RICHARD L. McCONN, D. J. MacIVER, JR. and L. M. VAREN KAMP, HOWARD BOYD, WILLIARD F. ROCKWELL, JR., W. D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J. R. HUBBARD

On Appeal from the United States
District Court for the
District of Delaware
(C. A. No. 83-13)

Argued February 28, 1984

Before: ADAMS, SLOVITER, *Circuit Judges*,
and TEITELBAUM, *District Judge*•

(Opinion Filed April 2, 1984)

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• Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Barbara Schreiber, a shareholder of El Paso Gas Company (El Paso), brought this action under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1976) (the Williams Act) after she lost the opportunity to profit from a hostile tender offer by Burlington Northern, Inc. (Burlington)[1] when the offer was rescinded and a friendly but less lucrative offer was substituted. The district court dismissed her complaint, holding that she failed to state a claim for violation of § 14(e) because she alleged no injury resulting from deception. *Schreiber v. Burlington Northern, Inc.*, 568 F. Supp. 197, 201-04 (D. Del. 1983). While we are troubled by some of the conduct averred in the complaint, we agree with the district court that Schreiber's alleged injuries are not actionable under the Williams Act. Accordingly, we affirm.

I.

In late 1982, having purchased over one-half million shares of El Paso in the open market, Burlington decided to complete its takeover of El Paso by making a tender offer for 25.1 million shares at $24 per share (the December tender offer). Deeming the offer a hostile one, El Paso management countered with numerous defensive measures. But El Paso shareholders reacted favorably, fully subscribing to the offer by the December 30, 1982 deadline.

1. Burlington used a wholly owned subsidiary, R-H Holdings Corp., to execute the details of the takeover. In this opinion, Burlington and R-H will be referred to jointly as Burlington.

Burlington, however, never accepted those tendered shares. Instead, after negotiations with El Paso management, Burlington announced on January 10, 1983 the terms of a new and friendly takeover agreement. Pursuant to the new agreement, Burlington undertook to: (1) rescind the December tender offer; (2) substitute a new tender offer (the January tender offer) for only 21 million shares, at $24 per share; and (3) recognize "golden parachute"[2] contracts between El Paso and four of its officers. By February 8, more than 40 million shares were tendered in response to Burlington's January offer, and the take-over was completed.

For shareholders like Barbara Schreiber, who tendered in response to the December offer, Burlington's withdrawal of that offer proved costly. The January offer was greatly oversubscribed, and consequently those shareholders who re-tendered were subject to substantial proration. Seeking redress, Schreiber filed suit on behalf of herself and similarly situated shareholders, alleging that Burlington, El

2. So-called "golden parachutes" generally provide multi-year benefits to high level executives of a target company after a takeover if they are discharged without cause or downgraded by the new management. As described in the Schedule 14D-9 filed by El Paso with the Securities and Exchange Commission on January 12, 1983, the "employment agreements" with the four officers provided for their "continued employment with the Company in their current positions and at not less than their current salary levels" for periods of either three or five years. App. at S-29 to S-30. The Schedule 14D-9 also disclosed that El Paso's Deferred Compensation Plan had been amended "to provide that for the purposes of such Plan a participant shall be deemed to have retired at the instance of the Company if his duties as a director, officer or employee of the Company have been diminished or curtailed by the Company in any material respect." App. at S-29.

Paso, and members of the El Paso board violated § 14(e)'s prohibition of "fraudulent, deceptive, or manipulative acts or practices ... in connection with any tender offer." She claims that Burlington's willful breach of the December tender offer was a manipulative distortion of the market for El Paso stock. Schreiber also alleges that in the January offer Burlington failed to disclose the golden parachutes and the fact that El Paso management finally approved the takeover because of the favorable arrangements negotiated with Burlington. Plaintiff thus claims that this January nondisclosure was a deceptive act forbidden by § 14(e).

Ruling on defendants' motions under Fed. R. Civ. P. 12(b)(6), the district court held that neither of Schreiber's theories of recovery was legally sufficient and dismissed the suit on June 27, 1983. This appeal followed.

II.

Schreiber's first theory of recovery -- that Burlington engaged in manipulation when it cancelled the December tender offer -- seeks to convert an arguable breach of contract into a violation of the Williams Act. The district court rejected this effort, holding that § 14(e) proscribes only acts that artificially affect market price through deception.

The courts of appeals are divided as to whether deception is a necessary element of the manipulative acts prohibited by § 14(e). In the first appellate decision directly to address this point, the Sixth Circuit held in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), that an option granted by a target company to a friendly bidder in order to block a hostile takeover attempt -- a "lock-up" option -- is a manipulative act within the scope of § 14(e), despite the lack of any deception. Since *Mobil*, however, the

Second Circuit has twice rejected efforts by hostile bidders to use § 14(e) to attack arrangements similar to the lock-up option. *Data Probe Acquis'n. Corp. v. Datalab, Inc.*, 722 F.2d 1 (2d Cir. 1983); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir. 1983). Both *Data Probe* and *Buffalo Forge* hold that Williams Act manipulation must involve misrepresentation -- that is, the omission or misstatement of material facts.

We believe that the Second Circuit's position, requiring some form of misrepresentation, represents a more accurate view of the Williams Act. As the legislative history and subsequent judicial interpretation of the Williams Act make clear, § 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers. Rather, § 14(e) was enacted principally as a disclosure statute, designed to insure that fully-informed investors could intelligently decide how to respond to a tender offer.[3] Considered in light of this philosophy of disclosure, withdrawal of the December offer did not violate § 14(e) since Burlington disclosed to the shareholders and to the general public the acts that allegedly constitute a breach of contract. In the analogous context of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), the Supreme Court has restricted the meaning of "manipulative device" to conduct "intended to mislead investors by artificially affecting

3. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968) (the Williams Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decisions"); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). *See* Edgar v. Mite Corp., 457 U.S. 624, 639 (1982); Piper v. Chris-Craft Industries, 430 U.S. 1, 31 (1977) (the Williams Act "was designed solely to get needed information to the investor"); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

market activity." *Santa Fe Ind. v. Green*, 430 U.S. 462, 477 (1977); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). That narrow definition of manipulation reinforces our view that Burlington complied with § 14(e) by fully disclosing its withdrawal of the December offer.

Although we share the Sixth Circuit's concern about defensive strategies "expressly designed" to "artificially affect normal healthy market activity," *Mobil, supra*, 669 F.2d at 374, we decline to join that court's open-ended notion of manipulative acts. To be sure, in drafting § 14(e) Congress chose to prohibit not only "fraudulent" and "deceptive" acts or practices, but also the "manipulative" ones, and therefore arguably sought to reach a broader range of conduct than mere misrepresentation. *See Mobil, supra*, 669 F.2d at 376-77; *see also* Note, *Target Defensive Tactics as Manipulative Under Section 14(e)*, 84 Col. L. Rev. 228, 237-8 (1984). But if taken at face value, there is a danger that the *Mobil* holding would transform all decisions by bidders or by target management that affect a tender offer contest into "artificial" influences.[4] Absent a requirement of deception, the Williams Act

4. For scholarly criticism of the broad reach of the *Mobil* holding, *see, e.g.*, Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule? 8 J. of Corp. Law. 337, 353-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw.L.J. 975, 991-95 (1982); Note, The Future of Lock-Ups After Mobil Corp. v. Marathon Oil, 27 St. Louis U.L.J. 261, 281-82 (1983); Note, "Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act, 12 Seton Hall L. Rev. 881, 891-95 (1982). *But see* Target Defensive Tactics, *supra*, 84 Col. L. Rev. at 252-62; Note, Section 14(e) of the Williams Act: Can There Be Manipulation with Full Disclosure or Was the Mobil Court Running on Empty?

would mandate that the federal courts supervise the substantive fairness of practically all tender offers. Mindful of the Supreme Court's instruction in *Santa Fe* that we should be reluctant to federalize state corporate law, 430 U.S. at 479, we reject *Mobil's* expansive view of § 14(e) and hold that deception is an essential element of a manipulative act.

Schreiber's second theory of recovery -- that Burlington failed to disclose the golden parachutes and the fact that such favors persuaded El Paso management to grant approval of the January offer -- does incorporate a claim of deception. As the district court correctly recognized, however, the alleged January nondisclosure was not causally linked to Schreiber's damages. The losses she sustained were the result of Burlington's decision to cancel the December offer, a decision unaffected by Burlington's alleged nondisclosure in the January offer. Even if Burlington had made full disclosure in the January offer, this information would have made no difference to shareholders like Schreiber, whose injury had already been caused by the December rescission. Lacking a causal link between the alleged misrepresentation and the injuries, Schreiber's second theory also fails.

III.

Our decision today by no means constitutes an endorsement of the conduct which the complaint attributes to the defendants. Of special concern to us are Schreiber's averments that El Paso management breached its fiduciary duty to stockholders when it negotiated such self-serving arrangements as the golden parachutes. Nonetheless, in the wake of *Sante Fe's* instruction that "once full and fair disclosure has occurred, the fairness of the transaction is at most a

tangential concern of the statute," 430 U.S. at 477-78, we are constrained to hold, until Congress directs otherwise, that shareholders like Schreiber must rely on the remedies provided by state law.

Accordingly, the judgment of the district court will be affirmed.

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5. Currently pending in the Delaware Court of Chancery is a certified class action on behalf of the same class that Schreiber seeks to represent here. Gilbert & Steiner v. The El Paso Co. and Burlington Northern Inc. (Del. Ch. Consol. Civ. Act. Nos. 7075 & 7079). The plaintiffs in that case assert under state law substantially the same claims for breach of contract and breach of fiduciary duty that Schreiber presses before us here.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES COURT

FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-13
BURLINGTON NORTHERN INC.)		
R-H HOLDINGS CORPORATION)		
THE EL PASO COMPANY,	)	
TRAVIS HUBERT PETTY,	)	
WILLIAM V. HOLIK, JR.,	)	
M. R. ENGLER, JR., W.G.	)	
HENDERSON, R. S. MORRIS	)	
M. A. EHRILICH, A.M.	)	
DERRICK, RICHARD L.	)	
McCONN, D.J. MacIVER,	)	
JR., and L. M. VAREN	)	
KAMP,	)	
	)	
Defendants.	)	

Thomas D. Whittington, Jr. and Judith N. Renzulli of Wilson, Whittington & Aulgur, Wilmington, Del., Irving Bizar of Pincus Ohrenstein Bizar D'Alessandro & Solomon, New York, N.Y., of counsel, for plaintiff.

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Robert K. Payson and James F. Burnett of Potter, Anderson & Corroon, Wilmington, Del., Mudge, Rose, Guthrie & Alexander, New York, N.Y., Wachtell, Lipton, Rosen & Katz, New York, N.Y., of counsel, for defendants The El Paso Company and the El Paso Directors.

OPINION

Wilmington, Delaware
June 27, 1983

LATCHUM, Chief Judge.

The term "manipulation" as used in Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), has defied precise definition. The Act itself does not delineate its scope nor has the Securities and Exchange Commission ("SEC") prescribed its exact meaning in its rules and regulations. Thus, the federal courts have been left to give meaning to the term on a case-by-case basis. A number of decisions, in an effort to explain its meaning within the context of the statute, have focused on the particular fact situations to which plaintiffs have sought to apply the Act. This Court must similarly approach the problem in the limited context of determining whether the alleged breach and withdrawal of a proposed tender offer constitutes a Section 14(e) manipulative violation.

Presently before the Court are defendants' motions to dismiss the amended complaint brought under Section 14(e) by the plaintiff, Barbara Schneider [sic], an El Paso Gas Company ("El Paso") stockholder. Plaintiff brings

this action seeking damages on her own behalf and on behalf of all other El Paso shareholders similarly situated against El Paso, El Paso's directors, Burlington Northern, Inc. ("Burlington"), and R-H Holdings Corporation ("R-H"), a wholly owned Burlington subsidiary.

FACTS

For the purposes of the present motions to dismiss, the Court must accept the allegations of the amended complaint as true. The allegations of the complaint may be summarized as follows: By December, 1982, R-H had acquired 537,800 of El Paso's shares in the open market. R-H then decided to make a tender offer for 25.1 million shares of El Paso, which constituted 51% of El Paso's common stock. On December 20, 1982, Burlington's chief executive officer informed El Paso's directors of its impending tender offer.

On December 21, 1982, R-H made its tender offer (the "December tender offer") for 25.1 million shares at $24 per share. The offer provided certain

"outs" for R-H by which it could terminate the offer:

> Notwithstanding any other provision of the Offer, the Purchaser shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the Offer ... if, at any time on or after December 17, 1982 and prior to the acceptance for payment of any such Shares ..., any of the following shall occur: ... if, in the sole judgment of the Purchaser, in any such case, regardless of the circumstance (including any action or inaction by the Purchaser) giving rise to any such condition, such condition makes it inadvisable to proceed with the Offer and/or with such purchase or payment.

(Docket Item ["D.I."] 24, at 4-5.)

On December 29, 1982, the plaintiff tendered her El Paso shares in response to the December offer and later that tender offer was fully subscribed. At first, El Paso's management decided to resist the December tender offer and began a number of defensive moves: it sued Burlington in the Delaware Court of Chancery and in the U.S. District Court for the Northern District of Texas; it

filed a Schedule 14D-9 with the SEC in which it threatened to dispose of its assets; it also announced the issuance of a new class of preferred stock[1] and amended its by-laws.

Thereafter, El Paso and Burlington entered into negotiations. As part of the negotiations, plaintiff alleges that the defendant directors of El Paso entered into special agreements with El Paso to provide them with "golden parachutes" in the form of extended employee benefits, allegedly worth millions of dollars, in the event El Paso should be taken over.

On January 10, 1983, the parties resolved this dispute and agreed to the following:

> (a) Defendants Burlington and R-H would rescind and cancel the December offer and instead, would tender a new offer ("January offer") seeking to acquire only 21,000,000 shares of El Paso stock at $24 cash net per share and would purchase an additional 4,166,667 shares directly from El Paso also at $24 net per share. In addition, Burlington was granted an option to purchase an additional 1,950,000 common shares of El Paso at $24 per share.
>
> (b) Burlington and R-H would recognize the "Golden Parachutes" of defendants Petty, Holik, Engler and Henderson and by their January Offer enable the individual defendants to tender their El Paso shares to Burlington, which had not been tendered pursuant to the December offer.

(D.I. 5, at 7-8.) The following day R-H commenced its second or January tender offer which sought only 21 million shares at the same $24 per share price. On February 8, 1983, R-H accepted 21 million shares for payment after more than 40 million shares had been tendered.

Thereafter, the plaintiff commenced this action alleging that defendants' conduct violated Section 14(e) of the Williams Act in the following manner:

---

[1] El Paso accomplished the issuance of a new class of preferred stock by "issuing a dividend upon its common

(Footnote continued from previous page)
stock, ... which had rights designed to inhibit business combinations and to change existing voting rights of El Paso's common stockholders." (D.I. 27, at 4.)

(a) The improper termination and withdrawal of the tender offer constituted a willful breach of the tender offer agreements entered into pursuant to the December offer between plaintiff and the other members of the class and defendants Burlington R-H and have caused loss and damage to the tendering plaintiff and class members in they they [sic] have been denied their contractual right to receive $24 per share net cash for each of their El Paso shares and said damage has occurred by reason of the conduct of defendants Burlington and R-H, as well as the wrongful interference by defendant El Paso and the individual defendants in said contractual arrangements.

(b) The January offer omits to inform the shareholders of El Paso of the Golden Parachutes granted by El Paso to defendants Petty, Holik, Engler and Henderson and that the individual defendant directors caused a cancellation of the prior tender offer to enable a tender of their own shares and was not for the benefit of the public shareholders of El Paso.

(D.I. 5, at 8-9.)[2]

Thus, plaintiff alleges that as a result of this activity she and the class members were damaged because they were deprived of the December tender offer price of $24 per share. Moreover, plaintiff contends that since she and the class members are required to retender their shares along with all other El Paso shareholders in the January offer, their shares which had been fully tendered in the December offer are now subject to extensive proration. Plaintiff therefore seeks damages for the alleged Section 14(e) violations and has moved the Court to certify this litigation as a class

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[2] There are also currently pending in the Delaware Court of Chancery three actions: Breitman v. Burlington Northern, Inc. C.A. No. 7075 (filed Jan. 19, 1983); Steiner v. Burlington Northern, Inc., C.A. No. 7079 (filed Jan. 17, 1983). The Gilbert case has been certified to proceed as a class action. (D.I. 24A, Ex. D.) These cases raise the issues of breach of contract, breach of fiduciary duties, tortious interference with contract and conspiracy. (D.I. 24A, Ex. A-D.)

action encompassing all El Paso shareholders who tendered their shares in response to the December offer. As previously indicated, all of the defendants have moved to dismiss the amended complaint under Fed.R.Civ.P. 12(b)(6). Specifically, defendants contend that the amended complaint fails to state a claim upon which relief can be granted because the willful breach of a tender offer contract or a tortious interference with such a contract are not violations of Section 14(e). In addition, defendants argue that the failure to disclose that El Paso granted "golden parachutes" to its directors and that these directors breached their fiduciary duties by causing the termination of the December tender offer are also not Section 14(e) violations because the failure to disclose a breach of fiduciary duty in tender offer materials is not a William Act violation.

The plaintiff counters by arguing that defendants' activity in terminating the December tender offer and initiating the January tender offer constituted a

manipulative practice in violation of Section 14(e) and relies upon the Sixth Circuit's recent decision in Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981), in support of that argument. The nondisclosure claims, plaintiff contends, are sufficiently pled to withstand a dismissal motion.

DISCUSSION

A. Manipulation Claim

The first question is whether the termination of the Decedmber tender offer and the initiation of the January tender offer amounted to manipulation within the meaning of that term in Section 14(e). We begin the analysis with the understanding that the basic purpose of the federal securities laws is to require "adequate disclosure." This concept had its origin in the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., which was passed in response to the abuses that led to the 1929 stock market crash. As envisaged by Congress, the purpose of the securities laws. was to ensure that potential investors would have available

to them sufficient information to enable them to make a reasoned decision as to whether or not to engage in a particular securities transaction. Indeed, President Roosevelt wrote Congress during consideration of the Securities Exchange Act of 1934:

> There remains the fact, however, that outside the field of legitimate investment, naked speculation has been made far too alluring and far to easy for those who could and for those who could not afford to gamble.
>
> Such speculation has run the scale from the individual who has risked his pay envelop or his meager savings on a margin transaction involving stock with whose true value he was totally unfamiliar, to the pool of individuals or corporations with large resources, often not their own, which sought by manipulation to raise or depress market quotations far out of line with reason, all of this resulting in loss to the average investor, who is of necessity personally uninformed.

Letter of President Franklin D. Roosevelt, S. Rep. No. 792, 73d Cong., 2d Sess. 1-2 (1934).

Furthermore, encompassed with the concept of adequate disclosure was the belief that an investor should be protected from those who might deceive or manipulate; the fear being that clandestine activity would improperly influence the investor or the market in general. In this respect, the Fletcher Report of the Senate Banking and Currency Committee noted: "The true function of an exchange is to maintain an open market for securities, whose supply and demand may freely meet at prices uninfluenced by manipualtion or control." Stock Exchange Practice, Report of Senate Banking and Currency Committee, S. Rep. No. 1455, 73d Cong., 2d Sess. 30 (1934). Thus, any manipulative activity that would interfere with the normal functioning of supply and demand would be prohibited by the Securities Exchange Act. Illustative of manipulative activity at the time of the Act's passage was the use of pools, whereby a group would secretly agree to actively trade in a single security so as to raise its price and then the pool members would unload the securities at a profit to the unsuspecting public. The

Fletcher Report pointed out that, "the activity fomented by a pool creates a false and deceptive appearance of genuine demand for the security on the part of the purchasing public and attracts persons relying upon this misleading appearance to make purchases." Id. at 32 (emphasis added).

The basic philosophy under the 1934 Act was carried forward in the enactment of the Williams Act. During consideration of this legislation, its sponsor, Senator Harrison Williams, stated that the Act "provides for full disclosure in cash tender offers," 113 Cong. Rec. 24664 (1967)(statement of Sen. Williams), and that "[t]hrough this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest." Id. at 24665. In particular, Senator Williams stated:

> The essential problem in transfers of control resulting from cash tender offers or open market or privately negotiated purchases is that persons seeking control in these ways

> are able to operate in alomost [sic] complete secrecy concerning their intentions, their commitments and even their identities. Since the competence and integrity of management and controlling persons are of vital importance to stockholders, secrecy in this essential area is inconsistent with the disclosure pattern generally prevailing in the American securities markets.

Id. at 855.

Thus, the underlying purpose of the Williams Act is the adequate disclosure of information to the shareholder "so that they can make informed investment decisions on the basis of the same facts known by the person making the tender." Id.

Those cases that have examined the purpose of the Williams Act have reaffirmed consistently that it is principally a disclosure statute. See Dan River, Inc. v. Icahn, [current] Fed. Sec. L. Rep. (CCH) ¶ 99,043, at 94,961 (4th Cir. 1983); Panter v. Marshall Field & Co., 646 F.2d 271, 282-83 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Whittaker Corp. v. Edgar, 535 F.Supp. 933, 947 (N.D. Ill. 1982); Martin

Marietta Corp. v. Bendix Corp., 549 F.Supp. 623, 627-29 (D.Md. 1982); Oklahoma Publishing Co. v. Standard Metals Corp., 541 F.Supp. 1109, 1112-13 (W.D.Okla. 1982); Merritt v. Colonial Foods, Inc., 499 F.Supp. 910, 913-14 (D.Del. 1980); Berman v. Gerber Products Co., 454 F.Supp. 1310, 1318 (W.D.Mich. 1978); In re Sushine Mining Co. Securities Litigation, 496 F.Supp. 9, 11 (S.D.N.Y. 1977). In fact, the Supreme Court has stated that the Williams Act "was designed solely to get needed information to the investor...." Piper v. Chris-Craft Indus., Inc. 430 U.S. 1, 30-31 (1977). See Rondeau v. Mosinee Paper Corp., 442 U.S. 49, 58 (1975).

Now that this Court has determined that the Williams Act is essentially a disclosure statute, it becomes necessary to determine how the term "manipulation" fits within this context.

In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the Supreme Court stated that manipulation is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of

securities." Id. at 199. Similalry, in Santa Fe Industries v. Green, 430 U.S. 462 (1977), the Court ruled that manipulation is activities "that are intended to mislead investors by artificially affecting market activity." Id. at 476.

Ernst & Ernst and Santa Fe both require an element of deception in order to be a manipulative violation. See Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?, 8 J. of Corp. Law 337, 354 (1983). The unfairness of a securities transaction, absent deception, the Santa Fe Court emphasized, is not the primary concern of the federal securities laws; rather, this is a concern of state law. 430 U.S. at 478-80.

Moreover, deception alone is not manipulation under Section 14(e). The manipulative activity must artificially affect the market price and do so in a misleading or deceptive manner. Manipulation essentially constitutes "artificial acts of stimulative trading designed to mislead investors into

believeing [sic] there was a heavy market demand for" the stock. Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349, 1363 (N.D.Tex. 1979).[3]

The fact, however, that a party's activity may affect market price cannot be the basis for a federal securities violation in the absence of deception. This was pointed out by Congress at the time the Securities Exchange Act was adopted:

> Any extensive purchases or sales are bound to cause changes in the market price of the security, but mere knowledge on the part of the purchaser or seller that his transaction will have this effect is not sufficient to bring him within the scope of this provision. Thus, if a person is merely trying to acquire a large block of stock for investment, or desires to dispose of a big holding, his knowledge that in doing so he will affect the market price does not suffice to make his actions unlawful.

S. Rep. No. 792, 73d Cong., 2d Sess. 17 (1934).

Thus, if the ordinary investor is able to reasonably point to a disclosed basis for the price change of a particular stock, there has not been manipulation under the Williams Act. It is when the activity in question is done in such a manner that the reason for the artificial change in price is undetectable by the ordinary investor that there is manipulation.

Applying the above analysis to the instant case, the Court finds that the

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3 Plaintiff has attempted to distinguish some of these cases by arguing that they are inapplicable because they are based on Rule 10b-5 instead of Section 14(e). This is a highly technical distinction. Except for the "in connection" requirement of Rule 10b-5, the two provisions are substantially the same. See, e.g., Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605 (5th Cir.), cert. denied, 419 U.S. 873 (1974); Bucher v. Shumway, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,142, at 96,299 (S.D.N.Y. 1979), aff'd, 622 F.2d 572 (2d Cir.), cert. denied, 449 U.S. 841 (1980). In re Sunshine Mining Co. Securities Litig., [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,217, at 96,635-36 (S.D.N.Y. 1979).

amended complaint fails to state a claim for manipulation under Section 14(e) of the Williams Act. While it is true that the defendants' activities with respect to the tender offer did influence the price of the stock, the amended complaint fails to allege any deception by the defendants. All activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly. If the Court were to hold that defendants' actions in terminating the December tender offer and initiating the January tender offer constituted manipulation under Section 14(e), then potential offerors and managment of target companies would be subject to liability every time a tender offer is revised or negotiated. Some latitude must be given in the application of the Williams Act for it was designed to enhance market activity through open supply and demand, not artificially restrain it.

As noted at the outset, plaintiff relies upon Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981), to support its contention that the

activities complained of here amounted to manipulation. In that case, Marathon was the target of Mobil's unfriendly tender offer. In resisting the tender offer, Marathon entered into an agreement with U.S. Steel which granted the latter an option to purchase one of Marathon's most valuable assets in the event U.S. Steel was unable to effectuate a successful tender of its own for Marathon. Id. at 367-68. The Court of Appeals for the Sixth Circuit held that the "lock-up" option given to U.S. Steel constituted a manipulative practice because it foreclosed bidding for the acquisition of Marathon.

The plaintiff argues that the activities complained of here are of a similar nature and the reasoning of Mobil should be followed. This Court disagrees. The Mobil decision is not the law of this Circuit, and it also appears to be an aberration in this field of the law.[4] As the commentators contend, and

[4] Legal commentators have soundly criticized Mobil. See, e.g., Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?, 8 J. of

this Court agrees, the Mobil decision is inconsistent with the rationale of the Santa Fe case. An analysis of the Williams Act shows that a key ingredient of a manipulative practice is deception, the direct opposite of disclosure, which the Santa Fe Court clearly pointed out. As that Court stated, "it repeatedly ... has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the transaction is at most a tangential concern of the statute." 430 U.S. at 477-78.

The allegedly manipulative activity of withdrawing the December tender offer in violation of alleged contractual

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(Footnote continued from previous page.)
Corp. Law 337, 353-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw.L.J. 975, 991-95 (1982); Note, The Future of Lock-Ups After Mobil Corp. v. Marathon Oil, 27 St. Louis U.L.J. 261, 281-82 (1983); Note, "Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act, 12 Seton Hall L. Rev. 881, 891-95 (1982).

arrangements was disclosed to the shareholders and the general public. Because there was no deception practiced upon the shareholders in terminating their alleged contractual rignts, there was no manipulative violation within the meaning of Section 14(e) and defendants' motion to dismiss the manipulative claim will be granted.

B. Nondisclosure Claim

Plaintiff's second claim is that the nondisclosure of El Paso's grant of "golden parachutes" to its directors and the fact that these directors caused the withdrawal of the December tender offer and the initiation of the January offer for their personal gain constituted as Section 14(e) violation. Defendants contend that this so-called nondisclosure claim should likewise be dismissed.

Generally, the Williams Act requires the tender offeror to disclose material information to the shareholders of the target company. This Court, however, need not decide whether the alleged omissions are material, but even if they are, they are completely unrelated to the

damages alleged. Plaintiff avers that her damage was a result of the withdrawal of the Decmember tender offer. But even if the alleged undisclosed facts had been transmitted to the El Paso shareholders, it would have had no effect whatsoever upon the withdrawal of the December offer, because it was R-H's management and not El Paso's shareholders who withdrew the December offer.[5]

This action is analogous to two cases where plaintiffs alleged injury due to withdrawal of tender offers for their stock, Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), and Lewis v. McGraw, 610 F.2d 192 (2d Cir.)(per curiam), cert. denied, 449 U.S. 951 (1980). In both cases, the plaintiffs sued under Section 14(e), contending that the tender offer materials contained misrepresentations. Both the Second and

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5 The defendants also argue that they properly disclosed this information and in any event they were under no obligation to do so. Because this Court has found sufficient grounds for dismissing this claim, it need not consider these arguments.

Seventh Circuits found in their respective cases that there was no Section 14(e) violation because the tender offers were withdrawn before the shareholders could rely upon them. Panter v. Marshall Field & Co., supra, 646 F.2d at 283-84; Lewis v. McGraw, supra, 619 F.2d at 195. Here the amended complaint fails to allege any causal nexus between the damage alleged by plaintiff -- that shareholders who tendered to the December offer could not fully participate in the January offer because of proration and were hence "deprived of the benefit of the $24 per share acquisition price originally proposed by defendants (D.I. 5, at 10) -- and the supposed omission of information in the January offer. Any failure to disclose the alleged breach of fiduciary duties by El Paso directors had absolutely no relevance to plaintiff's alleged damanges. Consequently, the Court will dismiss plaintiff's so-called nondisclosure claim.

C. Pendent State Claims

Plaintiff's amended complaint vaguely asserts that defendants' conduct in

addition to violating Section 14(e) also violated "the principles of common law." Because this Court has dismissed the Williams Act claims, the only ones conferring subject matter jurisdiction upon the Court, the pendent state claims for breach of contract and breach of fiduciary duty will also be dismissed. The Supreme Court in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), instructed: "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." To the same effect are: Walck v. American Stock Exchange, Inc., 687 F.2d 778, 792 (3d Cir. 1982); Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir. 1976).[6]

CONCLUSION

This case is the perfect example of a plaintiff, who may have nonfrivolous

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[6] Because the Court has dismissed all the claims in the amended complaint, there is no need to rule on plaintiff's motion for class certification.

claims based on state law for breach of contract, tortious interference with contract, breach of fiduciary duties and perhaps even conspiracy, attempting to characterize those state law claims as violations of the federal securities laws. This ploy, however, has been foreclosed since Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). In that case, the Supreme Court held that courts should be reluctant to federalize a substantial portion of corporate law traditionally left to state regulations. Accordingly, it will be the Delaware Chancery Court, in its pending action, which will appropriately decide those corporate law issues.

An order will be entered in accordance with this opinion.

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 83-13
BURLINGTON NORTHERN INC.)		
R-H HOLDINGS CORPORATION)		
THE EL PASO COMPANY,	)	
TRAVIS HUBERT PETTY,	)	
WILLIAM V. HOLIK, JR.,	)	
M. R. ENGLER, JR., W.G.	)	
HENDERSON, R. S. MORRIS	)	
M. A. EHRILICH, A.M.	)	
DERRICK, RICHARD L.	)	
McCONN, D.J. MacIVER,	)	
JR., and L. M. VAREN	)	
KAMP,	)	
	)	
Defendants.	)	

ORDER

For the reasons set forth in the Court's Opinion entered in this case on this date, it is

ORDERED that the amended complaint is hereby dismissed.

Dated: June 27, 1983.

/s/
Chief Judge

APPENDIX B

APPENDIX B

The Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

The Commerce Clause of the United States Constitution (U.S. Const. art. I, §8, cl. 3):

> The Congress shall have Power...
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

* * *

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend. XIV):

> Section 1. All persons born or naturalized in the United States, and subject to the jur-

isdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 14(e) of the Williams Act, 15 U.S.C. 78n(e):

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which there are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

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CLERK

No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

– against –

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR. and L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J.R. HUBBARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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LISTING PURSUANT TO RULE 28.1

The following is a list of all subsidiaries, except wholly owned subsidiaries, and affiliates of Burlington Northern Inc., R-H Holdings Corporation and The El Paso Company:

Butte Pipe Line Company
Portal Pipe Line Company
New Mexico and Arizona Land Company
The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railway Company
Paducah & Illinois Railway Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Lake Country
Windjammer, Inc.
Adams Canyon Ranch
Santa Paula Farms
El Paso Natural Gas Company
El Paso Europe-Afrique, S.A.
Minera San Pedro Corralitos, S.A.

QUESTIONS PRESENTED

1. In the absence of any allegation of deception by the defendants, does the alleged breach of a tender offer contract state a cause of action for "manipulation" under Section 14(e) of the Williams Act, 15 U.S.C. § 78n(e)?

2. Is there a direct conflict on an important issue of federal law between the holding of the Third Circuit in this case and the holding of the Sixth Circuit in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981)? The Third Circuit held below that Section 14(e) of the Williams Act was not violated when an offeror terminated its tender offer prior to the "withdrawal date" of that offer, and commenced a new tender offer at the same price but for a smaller number of shares. The Sixth Circuit held in *Mobil* that a "target company" violated Section 14(e) when it granted options to purchase a large block of its stock and its "crown jewel" asset to a friendly offeror, thereby thwarting the tender offer of a second, "hostile" bidder.

STATEMENT OF THE CASE

Respondents take exception to the argumentative "Statement of the Case" contained in Petitioner's Supporting Brief, and refer this Court to the opinion of the District Court below (App. B 4-7) for an accurate summary of the relevant facts. However, Respondents do wish to correct one particularly misleading portion of the Petitioner's Statement of the Case – that Burlington "controlled" El Paso when the December offer was terminated on January 10, 1983.

Petitioner states that (i) "the December offer...had a *deadline* of December 30, 1983 [sic]", (ii) "by the December 30, 1983 [sic] deadline, the December tender offer was fully subscribed and Burlington had majority control of El Paso", (iii) "Burlington 'locked-up' El Paso since the accepted December offer blocked other offers and artificially impacted the market price" and (iv) "during the interval when the first offer was accepted, no one else would make a tender offer". Pet. Br. at 4, 6-7. None of these statements is true. As required by Section 14(d) of the Williams Act, 15 U.S.C. § 78n(d), and the regulations of

the Securities and Exchange Commission, Burlington's December offer provided (i) that all shares tendered into the offer could be withdrawn at any time prior to January 12, 1983 and (ii) that Burlington could not purchase any shares of El Paso stock until January 19, 1983. *See* Rules 14d-7 and 14e(1)(a), 17 C.F.R. §§ 240.14d-7, 240.14e(1)(a). Thus, when the December offer was terminated the withdrawal date for the offer had not expired, all El Paso shareholders were free to withdraw any shares which they had tendered into the December offer, and tender into a higher, competing offer or sell in the market; in *no* sense can Burlington be deemed to have "controlled" El Paso on Janurary 10, 1983.[1]

SUMMARY OF ARGUMENT

1. The decision below is clearly correct and is controlled by decisions of this Court in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). In the absence of deception, there is no claim for "manipulation" under Section 14(e) of the Williams Act. As the District Court held in this case, the Sixth Circuit's decision in *Mobil Corp. v. Marathon Oil Corp.*, 669 F.2d 366 (6th Cir. 1981), is "an aberration in this field of the law" (App. B 21), is inconsistent with the legislative history of the Williams Act and the decisions of this Court, and has been soundly rejected by virtually all courts which have considered the issue.[2]

---

[1] Equally false is Petitioner's assertion that the termination of the December offer was "manipulative" because it "occurred after the offer had...become legally binding." Pet. Br. at 27. As the United States District Court for the District of Delaware recently noted, in dismissing another plaintiff's attempt to fashion a § 14(e) claim out of these facts: "Because the December offer contained a number of conditions, some of which occurred, the December offer could have been terminated and withdrawn any time after December 17, 1982, and prior to acceptance by Burlington and R-H [Holdings Corporation] for payment". *Brill v. Burlington Northern Inc., et al.*, Civ. Act. No. 83-345 (D. Del., July 13, 1984), Slip op. at 9.

[2] This Court has recently denied certiorari in two cases rejecting *Mobil*, and involving circumstances far closer to the *Mobil* circumstances than those involved in the present case. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S. Ct. 550 (1983).

2. In any event, there is no direct conflict between the *Mobil* decision and the present case. In *Mobil*, the Sixth Circuit held that a target company's grant of irrevocable options to purchase its most valuable asset and a large block of stock – to be exercised only if a hostile bidder gained control of the target – was a "manipulative act" under Section 14(e) because it "completely block[ed] normal market activity" in the company's stock. The termination of the December offer and commencement of a new offer by Burlington had no such effect on normal market activity and, indeed, provided the opportunity for further competitive bidding for the stock. This is, therefore, a particularly inappropriate case to consider the *Mobil* theory, since even if *Mobil* had been accepted by the Third Circuit, the result would have been the same. As the Court of Appeals put it, the present complaint "seeks to convert an arguable breach of contract into a violation of the Williams Act." (App. A 5). This has nothing whatever to do with the matter at issue in *Mobil*.

Accordingly, Respondents respectfully request that certiorari be denied.

ARGUMENT

I.

THE DECISION BELOW IS CORRECT AND IS IN FULL ACCORD WITH THE CONTROLLING DECISIONS OF THIS COURT

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), this Court exhaustively reviewed the legislative history of the Williams Act and concluded that the Act "was designed *solely* to get needed information to the investor". *Id.* at 31 (emphasis supplied). *Accord, Edgar v. MITE Corp.*, 456 U.S. 624, 639 (1982) ("Both the House and Senate Reports observed that the Act was 'designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision'"); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58 (1975) ("[t]he purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information...").

In accord with this legislative history, the federal courts, including the Third Circuit here, have held with virtual unanimity that "[a]n essential ingredient of a section 14(e) cause of action...is misrepresentation, *i.e.*, the omission or misstatement of material facts." *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.), *cert. denied*, 104 S.Ct. 550 (1983). *See, e.g., Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S.Ct 1326 (1984); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 n.10 (4th Cir. 1983); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 282-283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Swanson v. Wabash, Inc.*, 577 F. Supp. 1308, 1314-16 (N.D. Ill. 1983); *Martin Marietta Corp. v. Bendix Corp.*, 549 F. Supp. 623, 628 (D. Md. 1982).

As both the District Court and the Third Circuit recognized in the present case (App. A 8-9, App. B 22, 27), this is the central teaching of this Court's decision in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977).[3] In holding that the phrase "manipulation" in Rule 10b-5 did not include "instances of corporate mismanagement...in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary," *id.* at 477, the Court reaffirmed that "the 'fundamental purpose' of the [Exchange] Act [is] implementing a 'philosophy of full disclosure,'" *id.* at 478, and that when "the cause of action [is] one traditionally relegated to state law,...it is entirely appropriate...to relegate [the plaintiff] to whatever remedy is created by state law." *Id.*[4]

[3] In dismissing the Petitioner's complaint, the District Court stated:

> This case is the perfect example of a plaintiff, who may have nonfrivolous claims based on state law for breach of contract, tortious interference with contract, breach of fiduciary duties and perhaps even conspiracy, attempting to characterize those state law claims as violations of the federal securities laws. This ploy, however, has been foreclosed since *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977). In that case, the Supreme Court held that courts should be reluctant to federalize a substantial portion of corporate law traditionally left to state regulations. Accordingly, it will be the Delaware Chancery Court, in its pending action, which will appropriately decide those corporate law issues. (App. A 27).

Petitioner contends that "Section 14(e) prohibits manipulation without requiring an element of deception". Pet. Br. at 14-18. But the two decisions of this Court on which she purports to rely, *see id.* at 17, confirm precisely the opposite conclusion. Thus, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), this Court stated that manipulation is "intentional or willful conduct designed to *deceive* or defraud investors by controlling or artificially affecting the price of securities." *Id.* at 199 (emphasis supplied). And, in *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), the Court, after stating that "nondisclosure is usually essential to the success of a manipulative scheme," *id.* at 477, defined manipulation as activities "that are intended to *mislead* investors by artificially affecting market activity." *Id.* at 476 (emphasis supplied)."[5] In short, "Congress's ban on 'manipulative acts and practices' was directed only at rigged transactions that might mislead investors." *Buffalo Forge Co. v. Ogden Corp., supra*, 717 F.2d at 760.

Nothing of the sort is alleged in the Petitioner's complaint; quite the contrary, as the District Court noted, "[a]ll activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly." (App. A 20).

[4] *quoting Cort v. Ash*, 422 U.S. 66, 78, 84 (1975), and *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 40, 41 (1977). It is well-established that "given the similarity of purpose of [§§ 10(b) and 14(e)]," the teachings of *Green* are equally applicable to § 14(e). *Berman v. Gerber Products Co.*, 454 F. Supp. 1310, 1318 (W.D. Mich. 1978), *quoting Altman v. Knight*, 431 F. Supp. 309, 314 (S.D.N.Y. 1977). *See also, Swanson v. Wabash Inc.*, 577 F. Supp. 1308, 1314 n.9 (N.D. Ill. 1983); *Panter v. Marshall Field & Co.*, 646 F.2d 271, 282-283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Seaboard World Airlines, Inc. v. Tiger International, Inc.*, 600 F.2d 355, 358 n.3 (2d Cir. 1979).

[5] The examples of "manipulation" the Court gave were "wash sales, matched orders, or rigged prices," *Green, supra*, 430 U.S. at 476 – devices "used to persuade the public that activity in a security is the reflection of supply and demand instead of a mirage." *Billard v. Rockwell International Corp.*, 526 F. Supp 218, 222 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 51 (2d Cir. 1982).

In seeking certiorari, Petitioner relies almost exclusively upon the Sixth Circuit's decision in *Mobil Corp. v. Marathon Oil Corp.*, 669 F.2d 366 (6th Cir. 1981), which, to Respondents' knowledge, is the *only* case which has *ever* found a violation of Section 14(e) in the absence of deception. Indeed, *Mobil* has been specifically rejected by at least two federal courts of appeals in similar situations;[6] as the District Court in the present case noted, *Mobil* is now considered to be an "aberration in this field of the law." (App. A 21). *See, e.g., Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.), *cert. denied*, 104 S.Ct. 580 (1983) (*Mobil* is "an unwarranted extension of the Williams Act"); *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1, 5 (2d Cir. 1983), *cert. denied*,104 S.Ct. 1326 (1984) (rejecting *Mobil* "to the extent that *Marathon* creates judge made substantive obligations imposed upon offerors or the management of offerees engaged in a tender offer contest"); *Martin Marietta Corp. v. Bendix Corp.*, 549 F.Supp. 623, 628, 630 (D. Md. 1982) (*Mobil* rests upon "an exceptionally strained interpretation of *Santa Fe*", which ignores the Supreme Court's admonition in *Piper* that 'Section 14(e) is solely a disclosure provision'); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 n.10 (4th Cir. 1983) (*Mobil* "has been criticized as inconsistent with the teachings of [*Green*] and [*Piper*] where the Supreme Court strongly indicated that deception is a predicate to a Section 14(e) claim"); *Swanson v. Wabash, Inc.*, 577 F.Supp. 1308, 1315 (N.D. Ill. 1983) (*Mobil* "flies in the face of the established [Supreme Court] interpretation of [§ 14(e)]").[7]

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[6] Petitioner's suggestion that the Ninth Circuit has also "adopted the Sixth Circuit's approach," Pet. Br. at 9, is based on a single sentence of *dictum* in *Pacific Realty Trust v. APC Investments, Inc.*, 685 F.2d 1083 (9th Cir. 1982), that "there are instances when violations of [Section 14(e)] are unrelated to the information supplied to the shareholders". *Id.* at 1086. Significantly, the holding of the Ninth Circuit in that case was that "full disclosure here would adequately protect the [target] shareholders as required by the Williams Act." *Id.* at 1087.

[7] Petitioner also argues that "relegating the injured parties to state court actions allows each state to fashion inconsistent remedies and relief or no remedy", Pet. Br. at 29, and that therefore "the need for uniformity", *id.* at 31, compels the expansive interpretation of "manipulative act" which she urges upon this Court. Petitioner ignores that precisely the same argument was made and rejected by this Court in *Santa Fe v. Green:*

> "Absent a clear indication of congressional intent, we are reluctant to federalize the subtantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.
>
> • • •
>
> There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to 'cover the corporate universe'."

Green, supra, 430 U.S. at 479-80.

Four bills to amend the Williams Act are currently pending before Congress, so that Congress will soon have an opportunity to express its intent as to whether the Williams Act should be broadened in any way. H.R. 5693, 5694, 5695, 5696, 98th Cong., 2d Sess., 130 Cong. Rec. H.4359-60 (May 22, 1984).

II.

THE DECISION BELOW DOES NOT CONFLICT WITH THE SIXTH CIRCUIT'S DECISION IN MOBIL

Even if there were a significant issue as to the continued viability of *Mobil*, this hardly would be an appropriate case to consider it, since the relevant facts and circumstances here bear no resemblance to those in *Mobil*. In *Mobil*, the target company (Marathon) granted U.S. Steel, a favored "white knight," an irrevocable option to purchase Marathon's most valuable asset (the Yates Field Oil reserve), to be exercisable only if a hostile bidder (such as Mobil) gained control of Marathon, and also granted to U.S. Steel an option to purchase its stock at a reduced price. On these unique facts, the Sixth Circuit held that Marathon's grant of these "lock-up" options to U.S. Steel constituted a "manipulative scheme" under Section 14(e), because it "not only artificially affect[ed], but for all practical purposes completely block[ed], normal healthy market activity and, in

fact, could be construed as expressly designed solely for that purpose." *Id.* at 374.[8]

The alleged breach of the tender offer contract in the present case has no conceivable similarity to these facts. As noted above, the options in *Mobil* were "manipulative" because their effect was to artificially and significantly *discourage competitive bidding* for the Marathon stock," *Mobil*, *supra*, 669 F.2d at 376 (emphasis supplied). Nothing of the kind occurred here. The termination of the December offer had nothing to do with the bidding process for El Paso stock, which had not, in any event, produced any competitive offer. Indeed, the termination of the December offer can be said to have facilitated "competitive bidding" by providing an *additional* fifteen business days (the withdrawal period under the new offer) for another company to make a competing bid for El Paso. *See* 17 C.F.R. § 240. 14d-7(a)(1). Moreover, in stark contrast to *Mobil*, none of El Paso's assets were disposed of or altered in any way; they would have been intact for any winning bidder.[9]

Because the termination of the December offer in no way thwarted the bidding process for El Paso, the Third Circuit's broader rejection of *Mobil*'s holding that deception is not a necessary element of the "manipulative act" prohibited by § 14(e) – while manifestly the correct legal result – was not necessary to the decision of the court below; even if the Third Circuit had accepted and applied the *Mobil* decision, the Petitioner's complaint would nevertheless have been properly

[8] Normal market activity was blocked, for example, because even if another bidder would otherwise have chosen to compete on the economic merits with U.S. Steel, it would have found that Marathon's most valuable asset, described by the Sixth Circuit as Marathon's "crown jewel," 669 F.2d at 367, was gone.

[9] Thus, Petitioner's assertion that defendants "prevented a free market", Pet. Br. at 23, and "locked out competing bids", *Id.* at 27, is simply empty rhetoric designed to twist the facts of this case into the "lock-up" language of *Mobil*. Indeed, petitioner's protest that "the case at bar...does not involve a claim of mere breach of fiduciary duty", *Id.* at 23, is belied by her Brief, which argues that "the termination of the December offer served no purpose other than enabling El Paso's management to protect themselves". *Id.* at 27. This is, of course, the classic language of a breach of fiduciary duty claim.

dismissed. For this reason, the Third Circuit has not "rendered a decision in conflict with the decision of another federal court of appeals on the same matter", Rule 17.1(a) of this Court, and this Court should not grant certiorari.[10]

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court deny the Petitioner's application for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Dated: July 25, 1984

Respectfully Submitted,

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[10] Indeed, as noted, this Court recently denied certiorari in two cases presenting facts which were infinitely closer to the *Mobil* facts than Burlington's purported "manipulative" termination of its December tender offer. *Data Probe Acquisition Corp. v. Datatab, Inc.*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 1326 (1984) (no § 14(e) violation when, in response to hostile tender offer, favored bidder granted an option for 200% of the presently outstanding voting shares of the target, "the practical effect [of which] was to guarantee that [bidder] could acquire [target] by exercising the option, no matter how many of the outstanding shares were tendered to [the hostile bidder]"); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir.), *cert. denied*, 104 S.Ct. 550 (1983) (sale and option equal to 21% of target's stock to a "white knight" in response to a hostile offer not a § 14(e) violation).

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(3)
Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

– against –

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. MC CONN, D.J. MAC IVER, JR., and L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J.R. HUBBARD,

Respondents.

PETITIONER'S REPLY BRIEF

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Petitioner submits this reply brief to respondents' opposing brief to the petition for a writ of certiorari.

1. Respondents contend that the cancellation of the first tender offer by Burlington and its submission of an immediate new tender offer after favorable agreements to the insiders was not a manipulative device, since there were fifteen (15) days which elapsed between the cancellation and the new offer -- sufficient time for a new tender offeror to appear on the scene. The argument assume facts not in the record or considered either in the District Court or the Third Circuit. The complaint in the District Court alleged that the second tender offer was made immediately after the cancellation of the first and there was insufficient time for either the market, the class or a white knight to react freely.

The District Court and the Third Circuit did not consider whether or not the conduct was manipulative. The rationale of the decisions below was the Third Circuit's view that the Mobil decision resulted in an open ended notion

of manipulative acts. The Third Circuit particularly felt that the Mobil holding "...would transform all decisions by bidders or by target management that affect a tender offer contest into 'artificial' influences..." (A.7) Both the District Court and the Third Circuit held that deception was required before manipulation could be considered. Thus, neither Court considered whether or not the complained of activity was a manipulation. Indeed, the Third Circuit was quick to disclaim that its decision was an endorsement of respondents' conduct in this case. (A.8)

Even if one was to consider respondents' argument that the fifteen (15) days period offered by Burlington was sufficient to enable another bidder to appear defies reality. Fifteen days is patently insufficient to arrange for the millions of dollars of financing and the other necessary steps to make a tender offer. Moreover, Burlington had, under the new arrangements, an important option to acquire a significant block of stock from El Paso -- a situation which would certainly discourage any new offer. Petitioners should be allowed --

as plaintiffs were in Mobil -- the opportunity to demonstrate, with discovery and affidavits, a factual showing that manipulation did take place.

2. Respondents continue to assert that Section 10(b) considerations must be read into Section 14(e) considerations. For the reasons set forth in our main petition, we disagree and would urge that the teachings of Santa Fe Industries are not applicable in the Section 14(e) context present at bar.

Respectfully submitted,

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No. 83-2129 (4)

Office Supreme Court, U.S.
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BARBARA R. SCHREIBER,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 26, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

250 PP

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RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

January 12, 1983 - Filed Complaint and issued summons

February 14, 1983 - Filed Second Amended Class Action Complaint

February 14, 1983 - Filed Motion to Dismiss by Defendants Burlington Northern, Inc. and R-H Holdings Corporation

February 14, 1983 - Filed Motion to Dismiss by Defendant The El Paso Company and the Individual Defendants

June 27, 1983 - Filed Opinion, Latchum, J.

June 27, 1983 - Filed Order, Latchum, J.
Second Amended Complaint dismissed

July 12, 1983 - Filed Notice of Appeal

RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

February 28, 1984 - Argument heard (by Adams, Sloviter, C.J. & Teitelbaum, D.J.)

April 2, 1984 - Judgment affirmed.

April 24, 1984 - Mandate issued.

October 3, 1984 - Filed certified copy of Order from United States Supreme Court granting Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER, Plaintiff, v. BURLINGTON NORTHERN INC.) R-H HOLDINGS CORPORATION) THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., R.S. MORRIS, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L.EMORY KATZ-ENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD, Defendants.	)	C. A. No. 83-13 PLAINTIFF DEMANDS A TRIAL BY JURY

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiff, by her attorneys Wilson & Whittington, P.A. for her Second Amended Complaint against defendants, alleges as follows:

1. This Court's jurisdiction is based on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa

("Act"), as amended and the principles of pendant jurisdiction.

2. The claims alleged herein arise under Section 14(e) of the Act, the Rules and Regulations of the Securities and Exchange Commission promulgated thereunder and the principles of common law.

3. Some of the defendants reside, are found and or transact business in the District of Delaware.

4. Some of the acts and transactions herein alleged to constitute the violations of the Act and the common law occurred within the District of Delaware, including the negotiations and other acts and transactions described hereinbelow. In connection therewith, defendants used, directly and indirectly, the means and instrumentalities of interstate commerce, the United States mails and the facilities of national securities exchanges and markets.

5. Plaintiff, a shareholder of defendant The El Paso Company ("El Paso") since 1976, tendered her shares in accordance with a tender offer promulgated by defendants Burlington Northern,

Inc. ("Burlington") and its wholly owned subsidiary R-H Holdings Corporation ("R-H"), dated December 21, 1982 ("December offer").

6. Defendant El Paso is, and throughout the times hereinafter alleged was, a corporation organized and existing under the laws of the State of Delaware, engaged in the business of being a diversified energy company. Its stock is actively traded on the New York Stock Exchange.

7. Defendant Burlington is, and throughout the times hereinafter alleged was, a corporation duly organized and existing under the laws of the State of Delaware, engaged in the business activities of transportation and natural resources.

8. Defendant R-H is, and throughout the times hereinafer alleged was, a corporation duly organized and existing under the laws of the State of Delaware and is a wholly owned subsidiary of defendant Burlington.

9. The individual defendants are the directors of El Paso, with some of

them owning substantial stock interests therein, and defendants Petty, Holik, and Morris are chairman of its board of directors, president, and executive vice-presidents, respectively. As such officers, directors and stockholders, they owe fiduciary duties and obligations to El Paso's public shareholders.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this action on behalf of herself and, pursuant to Rule 23 of the Federeal Rules of Civil Procedure, on behalf of all other shareholders of El Paso who tendered their shares to defendants Burlington and R-H pursuant to the December offer, the amount of such tendered shares totalling 25,100,000 shares, and as a result of the cancellation of the December offer are damaged thereby. All such persons, including plaintiff, shall be referred to hereinafter, as the "class".

11. Excluded from the class are the individual defendants and the other defendants and members of their immediate families and officers and directors thereof who may have purchased securities

[of] El Paso and are subject to or tendered their shares to defendants Burlington and R-H.

12. The members of the class exceed several thousand since the December offer resulted in 25,100,000 shares of El Paso stock being tendered before its cancellation and the new revised tender offer described below will only seek 21,000,000, shares to be tendered, thus the proration results in damages to the shareholders who tendered 25,100,000 shares. Joinder is therefore impracticable. The precise number of class members and their addressess (sic) are readily determinable in the books and records of El Paso, brokerage firms or those of their agents.

13. Plaintiff tendered her shares of El Paso on December 29, 1982 in accordance with the December offer. She is commited (sic) to pursuing this action and has retained counsel experienced in actions of this nature. Accordingly, plaintiff is an adequate representative of the class and has the same interest as all the members of the class. Her claims

are typical of the claims of class members, and she will fairly and adequately protect the members of the class.

14. An action under Rule 23 of the Federal Rules of Civil Procedure is superior to other available methods for the fair and efficient adjudication of this controversy, since the class is numerous and its membership so wide spread that joinder of all members is impracticable. Furthermore, as individual damages of any one class member may be relatively small, the expense and burden of non-litigation may well be unjustifiable for persons seeking to recover their individual damages. Plaintiff does not anticipate any difficulty in the management of this suit as a class action.

15. The questions of law or fact common to the class and which predominate over individual questions, include:

(a) whether the Act was violated by [any] of [the] defendants;

(b) whether Burlington and R-H breached their contracts with plaintiff and the members of the class who tendered

their shares pursuant to the December offer;

(c) whether defendant El Paso and the individual defendants interfered with the contractual arrangements between plaintiff and members of the class to cause cancellation of the December offer and substitution of a new tender offer;

(d) whether the substituted new tender offer contains omissions and misrepresentations with respect to the tender offer;

(e) whether certain contractual arrangements entered into by defendants Petty, Holik, and Morris with El Paso were breaches of fiduciary duty;

(f) the extent of damages sustained by plaintiff and members of the class and the appropriate mode and measure of damages and other relief.

SUBSTANTIVE ALLEGATIONS

16. In or about November and December 1982, defendant Burlington through a wholly owned subsidiary acquired 537,800 shares of El Paso stock on the open market. Thereafter, on or about December 20, 1982, the chief executive

officer of defendant Burlington contacted defendant El Paso and informed said defendant that Burlington wished to make a tender offer for 51% of El Paso's common stock at $24 net per share in cash.

17. Thereafter, on December 21, 1982, the December offer was submitted to the El Paso shareholders seeking to acquire 25,100,000 shares at $24 net per share in cash. The actual acquisition was to be made by defendant R-H, a wholly owned subsidiary of defendant Burlington, which had been organized specifically for the purpose of the tender offer and to make the acquisition thereunder. If all 25,100,000 shares had tendered, defendants Burlington and R-H would own approximately 51.8% of the outstanding stock of El Paso.

18. Thereafter, plaintiff tendered her shares in accordance with the terms [of] the December offer, as did the other members of the class. Defendant Burlington and its wholly owned subsidary (sic) R-H received tenders for 25,100,000 shares in accordance with the terms of the tender offer.

19. Under said terms, defendant Burlington became obligated to pay for said shares the cash sum of $24 net per share.

20. The aforesaid tender offer provided a number of conditions ("outs") under which Burlington could cancel the tender offer. None of those outs became applicable and none of the events foreseen in said "outs" ever occurred.

21. Instead, defendant El Paso attempted to counter the tender offer by purporting to issue shares of preferred stock. This attempted issuance became the subject of bitter litigation between defendants Burlington and El Paso before the Chancery Court, New Castle County, Delaware. Defendant Burlington contended, inter alia, that the aforesaid issuance or proposed issuance of preferred stock was illegal. When it became apparent that said position would be sustained by the Court and an injunction would issue, defendant El Paso entered into negotiations with defendants Burlington and R-H with a view to ending the dispute between the parties.

22. As part of the negotiations, defendants Petty, Holik, and Morris entered into special agreements ("Golden Parachutes") with El Paso to provide for these defendants to receive extended employment benefits in the event El Paso should be taken over, which benefits would give them millions of dollars of extra compensation. In addition, the individual defendants wished to insure that they would be in a position to tender their El Paso stock to Burlington, which they had not done in connection with the December offer.

23. Accordingly, the parties resolved the litigation and their disputes on or about January 10, 1983 on the following terms:

(a) Defendants Burlington and R-H would rescind and cancel the December offer and instead, would tender a new offer ("January offer") seeking to acquire only 21,000,000 shares of El Paso stock at $24 cash net per share and would purchase an additional 4,166,667 shares directly from El Paso also at $24 net per share. In addition, Burlington was

granted an option to purchase and (sic) additional 4,950,000 common shares of El Paso at $24 per share.

(b) Burlington and R-H would recognize the "Golden Parachutes" of defendants Petty, Holik, and Morris and by their January offer enable the individual defendants to tender their El Paso shares to Burlington, which had not been tendered pursuant to the December offer.

24. Thereafter, defendants caused the January offer to be submitted to the shareholders of El Paso. Said tender offer called for a tender of only 21,000,000 shares at a price of $24 per share.

25. The aforesaid conduct and new tender offer violated Section 14(e) of the Act, the applicable Rules and Regulations of the Securities and Exchange Commissions and the principles of common law in the following respects:

(a) The improper termination and withdrawal of the tender offer constituted a willful breach of the tender offer agreements entered into pursuant to the December offer between plaintiff and

the other members of the class and defendants Burlington and R-H and have caused loss and damage to the tendering plaintiff and class members in that they have been denied their contractual right to receive $24 per share net cash for each of their El Paso shares and said damage has occurred by reason of the conduct of defendants Burlington and R-H, as well as the wrongful interference by defendant El Paso and the individual defendants in said contractual arrangements.

(b) The January offer omits to inform the shareholders of El Paso of the Golden Parachutes granted by El Paso to defendants Petty, Holik, and Morris and that the individual defendant directors caused a cancellation of the prior tender offer to enable a tender of their own shares and was not for the benefit of the public shareholders of El Paso.

26. As a result of the foregoing, all those who tendered their shares in response to the December offer will not receive payments in accordance with its terms. Instead, they will have to tender their shares anew and be subject to an

extensive proration. Thus, they have sustained losses.

27. As a result of the foregoing, plaintiff and the other members of the class were deprived of the benefit of the $24 per share acquisition price originally proposed by defendants Burlington and R-H, loss and were further damaged by being deprived of the use of their El Paso shares and interest thereon, and were damaged accordingly while defendants have profitted thereby.

WHEREFORE, plaintiff demands judgment against defendants, and each of them as follows:

1. Determining that this action is a proper class action maintainable pursuant to Rule 23 of the Federal Rules of Civil Procedure;

2. Awarding plaintiff and each other members of the class herein damages for the wrongs complained of herein, together with appropriate interest;

3. Awarding plaintiff and each other member of the class herein defined their cost and disbursements of this action, including the reasonable fees of

plaintiff's attorneys, accountants and experts; and

4. Awarding plaintiff and each other member of the class such other and further relief as may be just and proper under the circumstances.

WILSON & WHITTINGTON, P.A.

By /s/
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Wilmington, Delaware 19899

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Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER,	§	
	§	
Plaintiff,	§	Civil Action No.
	§	83-13
v.	§	
	§	
BURLINGTON NORTHERN,	§	
INC., et al.	§	
	§	
Defendants.	§	

MOTION TO DISMISS

Defendants Burlington Northern, Inc. and R-H Holdings Corporation hereby move this Court for an Order pursuant to Rule 12(b)(6), F.R.C.P., dismissing this action for failure to state a claim upon which relief can be granted.

MORRIS, NICHOLS, ARSHT & TUNNELL

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER,	§	
	§	
Plaintiff,	§	C.A. No. 83-13
	§	
v.	§	
	§	
BURLINGTON NORTHERN,	§	
INC., et al.	§	
	§	
Defendants.	§	

MOTION TO DISMISS

Defendants The El Paso Company and all of the individual defendants hereby move this Court for an Order pursuant to Rule 12(b)(6), F.R.C.P., dismissing this action on the ground that the Second Amended Class Action Complaint fails to state a claim upon which relief can be granted.

POTTER ANDERSON & CORROON

By _____
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Dated: February 14, 1983

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER, Plaintiff,	)	
v.	)	Civil Action No. 83-13
BURLINGTON NORTHERN INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M. R. ENGLER, JR., W.G. HENDERSON, R. S. MORRIS, M. A. EHRILICH, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., and L. M. VAREN KAMP, Defendants.	)	

Thomas D. Whittington, Jr. and Judith N. Renzulli of Wilson, Whittington & Aulgur, Wilmington, Del., Irving Bizar of Pincus Ohrenstein Bizar D'Alessandro & Solomon, New York, N.Y., of counsel, for plaintiff.

A. Gilchrist Sparks, III of Morris, Nichols, Arsht & Tunnell, Wilmington, Del., Marc P. Cherno and Stephen D. Alexander of Fried, Frank, Harris, Shriver & Jacobson, New York, N.Y., of counsel, for defendants Burlington Northern, Inc. and R-H Holdings Corporation.

Robert K. Payson and James F. Burnett of Potter, Anderson & Corroon, Wilmington, Del., Mudge, Rose, Guthrie & Alexander, New York, N.Y., Wachtell, Lipton, Rosen & Katz, New York, N.Y., of counsel, for defendants The El Paso Company and the El Paso Directors.

OPINION

Wilmington, Delaware
June 27, 1983

LATCHUM, Chief Judge.

The term "manipulation" as used in Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), has defied precise definition. The Act itself does not delineate its scope nor has the Securities and Exchange Commission ("SEC") prescribed its exact meaning in its rules and regulations. Thus, the federal courts have been left to give meaning to the term on a case-by-case basis. A number of decisions, in an effort to explain its meaning within the context of the statute, have focused on the particular fact situations to which plaintiffs have sought to apply the Act. This Court must similarly approach the problem in the limited context of determining whether the alleged breach and withdrawal of a proposed tender offer constitutes a Section 14(e) manipulative violation.

Presently before the Court are defendants' motions to dismiss the amended complaint brought under Section 14(e) by the plaintiff, Barbara Schneider [sic], an El Paso Gas Company ("El Paso") stockholder. Plaintiff brings

this action seeking damages on her own behalf and on behalf of all other El Paso shareholders similarly situated against El Paso, El Paso's directors, Burlington Northern, Inc. ("Burlington"), and R-H Holdings Corporation ("R-H"), a wholly owned Burlington subsidiary.

FACTS

For the purposes of the present motions to dismiss, the Court must accept the allegations of the amended complaint as true. The allegations of the complaint may be summarized as follows: By December, 1982, R-H had acquired 537,800 of El Paso's shares in the open market. R-H then decided to make a tender offer for 25.1 million shares of El Paso, which constituted 51% of El Paso's common stock. On December 20, 1982, Burlington's chief executive officer informed El Paso's directors of its impending tender offer.

On December 21, 1982, R-H made its tender offer (the "December tender offer") for 25.1 million shares at $24 per share. The offer provided certain

"outs" for R-H by which it could terminate the offer:

> Notwithstanding any other provision of the Offer, the Purchaser shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the Offer ... if, at any time on or after December 17, 1982 and prior to the acceptance for payment of any such Shares ..., any of the following shall occur: ... if, in the sole judgment of the Purchaser, in any such case, regardless of the circumstance (including any action or inaction by the Purchaser) giving rise to any such condition, such condition makes it inadvisable to proceed with the Offer and/or with such purchase or payment.

(Docket Item ["D.I."] 24, at 4-5.)

On December 29, 1982, the plaintiff tendered her El Paso shares in response to the December offer and later that tender offer was fully subscribed. At first, El Paso's management decided to resist the December tender offer and began a number of defensive moves: it sued Burlington in the Delaware Court of Chancery and in the U.S. District Court for the Northern District of Texas; it

filed a Schedule 14D-9 with the SEC in which it threatened to dispose of its assets; it also announced the issuance of a new class of preferred stock[1] and amended its by-laws.

Thereafter, El Paso and Burlington entered into negotiations. As part of the negotiations, plaintiff alleges that the defendant directors of El Paso entered into special agreements with El Paso to provide them with "golden parachutes" in the form of extended employee benefits, allegedly worth millions of dollars, in the event El Paso should be taken over.

On January 10, 1983, the parties resolved this dispute and agreed to the following:

> (a) Defendants Burlington and R-H would rescind and cancel the December offer and instead, would tender a new offer ("January offer") seeking to acquire only 21,000,000 shares of El Paso stock at $24 cash net per share and would purchase an

---

[1] El Paso accomplished the issuance of a new class of preferred stock by "issuing a dividend upon its common

> additional 4,166,667 shares directly from El Paso also at $24 net per share. In addition, Burlington was granted an option to purchase an additional 1,950,000 common shares of El Paso at $24 per share.
>
> (b) Burlington and R-H would recognize the "Golden Parachutes" of defendants Petty, Holik, Engler and Henderson and by their January Offer enable the individual defendants to tender their El Paso shares to Burlington, which had not been tendered pursuant to the December offer.

(D.I. 5, at 7-8.) The following day R-H commenced its second or January tender offer which sought only 21 million shares at the same $24 per share price. On February 8, 1983, R-H accepted 21 million shares for payment after more than 40 million shares had been tendered.

Thereafter, the plaintiff commenced this action alleging that defendants' conduct violated Section 14(e) of the Williams Act in the following manner:

(Footnote continued from previous page)
stock, ... which had rights designed to inhibit business combinations and to change existing voting rights of El Paso's common stockholders." (D.I. 27, at 4.)

(a) The improper termination and withdrawal of the tender offer constituted a willful breach of the tender offer agreements entered into pursuant to the December offer between plaintiff and the other members of the class and defendants Burlington R-H and have caused loss and damage to the tendering plaintiff and class members in they they [sic] have been denied their contractual right to receive $24 per share net cash for each of their El Paso shares and said damage has occurred by reason of the conduct of defendants Burlington and R-H, as well as the wrongful interference by defendant El Paso and the individual defendants in said contractual arrangements.

(b) The January offer omits to inform the shareholders of El Paso of the Golden Parachutes granted by El Paso to defendants Petty, Holik, Engler and Henderson and that the individual defendant directors caused a cancellation of the prior tender offer to enable a tender of their own shares and was not for the benefit of the public shareholders of El Paso.

(D.I. 5, at 8-9.)[2]

Thus, plaintiff alleges that as a result of this activity she and the class members were damaged because they were deprived of the December tender offer price of $24 per share. Moreover, plaintiff contends that since she and the class members are required to retender their shares along with all other El Paso shareholders in the January offer, their shares which had been fully tendered in the December offer are now subject to extensive proration. Plaintiff therefore seeks damages for the alleged Section 14(e) violations and has moved the Court to certify this litigation as a class

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2 There are also currently pending in the Delaware Court of Chancery three actions: Breitman v. Burlington Northern, Inc. C.A. No. 7075 (filed Jan. 19, 1983); Steiner v. Burlington Northern, Inc., C.A. No. 7079 (filed Jan. 17, 1983). The Gilbert case has been certified to proceed as a class action. (D.I. 24A, Ex. D.) These cases raise the issues of breach of contract, breach of fiduciary duties, tortious interference with contract and conspiracy. (D.I. 24A, Ex. A-D.)

action encompassing all El Paso shareholders who tendered their shares in response to the December offer. As previously indicated, all of the defendants have moved to dismiss the amended complaint under Fed.R.Civ.P. 12(b)(6). Specifically, defendants contend that the amended complaint fails to state a claim upon which relief can be granted because the willful breach of a tender offer contract or a tortious interference with such a contract are not violations of Section 14(e). In addition, defendants argue that the failure to disclose that El Paso granted "golden parachutes" to its directors and that these directors breached their fiduciary duties by causing the termination of the December tender offer are also not Section 14(e) violations because the failure to disclose a breach of fiduciary duty in tender offer materials is not a William Act violation.

The plaintiff counters by arguing that defendants' activity in terminating the December tender offer and initiating the January tender offer constituted a

manipulative practice in violation of Section 14(e) and relies upon the Sixth Circuit's recent decision in Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981), in support of that argument. The nondisclosure claims, plaintiff contends, are sufficiently pled to withstand a dismissal motion.

DISCUSSION

A. Manipulation Claim

The first question is whether the termination of the Decedmber tender offer and the initiation of the January tender offer amounted to manipulation within the meaning of that term in Section 14(e). We begin the analysis with the understanding that the basic purpose of the federal securities laws is to require "adequate disclosure." This concept had its origin in the Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq., which was passed in response to the abuses that led to the 1929 stock market crash. As envisaged by Congress, the purpose of the securities laws was to ensure that potential investors would have available

to them sufficient information to enable them to make a reasoned decision as to whether or not to engage in a particular securities transaction. Indeed, President Roosevelt wrote Congress during consideration of the Securities Exchange Act of 1934:

> There remains the fact, however, that outside the field of legitimate investment, naked speculation has been made far too alluring and far to easy for those who could and for those who could not afford to gamble.
>
> Such speculation has run the scale from the individual who has risked his pay envelop or his meager savings on a margin transaction involving stock with whose true value he was totally unfamiliar, to the pool of individuals or corporations with large resources, often not their own, which sought by manipulation to raise or depress market quotations far out of line with reason, all of this resulting in loss to the average investor, who is of necessity personally uninformed.

Letter of President Franklin D. Roosevelt, S. Rep. No. 792, 73d Cong., 2d Sess. 1-2 (1934).

Furthermore, encompassed with the concept of adequate disclosure was the belief that an investor should be protected from those who might deceive or manipulate; the fear being that clandestine activity would improperly influence the investor or the market in general. In this respect, the Fletcher Report of the Senate Banking and Currency Committee noted: "The true function of an exchange is to maintain an open market for securities, whose supply and demand may freely meet at prices uninfluenced by manipualtion or control." Stock Exchange Practice, Report of Senate Banking and Currency Committee, S. Rep. No. 1455, 73d Cong., 2d Sess. 30 (1934). Thus, any manipulative activity that would interfere with the normal functioning of supply and demand would be prohibited by the Securities Exchange Act. Illustative of manipulative activity at the time of the Act's passage was the use of pools, whereby a group would secretly agree to actively trade in a single security so as to raise its price and then the pool members would unload the securities at a profit to the unsuspecting public. The

Fletcher Report pointed out that, "the activity fomented by a pool creates a false and deceptive appearance of genuine demand for the security on the part of the purchasing public and attracts persons relying upon this misleading appearance to make purchases." Id. at 32 (emphasis added).

The basic philosophy under the 1934 Act was carried forward in the enactment of the Williams Act. During consideration of this legislation, its sponsor, Senator Harrison Williams, stated that the Act "provides for full disclosure in cash tender offers," 113 Cong. Rec. 24664 (1967)(statement of Sen. Williams), and that "[t]hrough this legislation people will have more information, and will be able to intelligently decide whether to accept a tender offer and sell their shares to a group which may wish to obtain a controlling interest." Id. at 24665. In particular, Senator Williams stated:

> The essential problem in transfers of control resulting from cash tender offers or open market or privately negotiated purchases is that persons seeking control in these ways

> are able to operate in alomost [sic] complete secrecy concerning their intentions, their commitments and even their identities. Since the competence and integrity of management and controlling persons are of vital importance to stockholders, secrecy in this essential area is inconsistent with the disclosure pattern generally prevailing in the American securities markets.

Id. at 855.

Thus, the underlying purpose of the Williams Act is the adequate disclosure of information to the shareholder "so that they can make informed investment decisions on the basis of the same facts known by the person making the tender." Id.

Those cases that have examined the purpose of the Williams Act have reaffirmed consistently that it is principally a disclosure statute. See Dan River, Inc. v. Icahn, [current] Fed. Sec. L. Rep. (CCH) ¶ 99,043, at 94,961 (4th Cir. 1983); Panter v. Marshall Field & Co., 646 F.2d 271, 282-83 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Whittaker Corp. v. Edgar, 535 F.Supp. 933, 947 (N.D. Ill. 1982); Martin

Marietta Corp. v. Bendix Corp., 549 F.Supp. 623, 627-29 (D.Md. 1982); Oklahoma Publishing Co. v. Standard Metals Corp., 541 F.Supp. 1109, 1112-13 (W.D.Okla. 1982); Merritt v. Colonial Foods, Inc., 499 F.Supp. 910, 913-14 (D.Del. 1980); Berman v. Gerber Products Co., 454 F.Supp. 1310, 1318 (W.D.Mich. 1978); In re Sushine Mining Co. Securities Litigation, 496 F.Supp. 9, 11 (S.D.N.Y. 1977). In fact, the Supreme Court has stated that the Williams Act "was designed solely to get needed information to the investor...." Piper v. Chris-Craft Indus., Inc. 430 U.S. 1, 30-31 (1977). See Rondeau v. Mosinee Paper Corp., 442 U.S. 49, 58 (1975).

Now that this Court has determined that the Williams Act is essentially a disclosure statute, it becomes necessary to determine how the term "manipulation" fits within this context.

In Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), the Supreme Court stated that manipulation is "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of

securities." Id. at 199. Similalry, in Santa Fe Industries v. Green, 430 U.S. 462 (1977), the Court ruled that manipulation is activities "that are intended to mislead investors by artificially affecting market activity." Id. at 476.

Ernst & Ernst and Santa Fe both require an element of deception in order to be a manipulative violation. See Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?, 8 J. of Corp. Law 337, 354 (1983). The unfairness of a securities transaction, absent deception, the Santa Fe Court emphasized, is not the primary concern of the federal securities laws; rather, this is a concern of state law. 430 U.S. at 478-80.

Moreover, deception alone is not manipulation under Section 14(e). The manipulative activity must artificially affect the market price and do so in a misleading or deceptive manner. Manipulation essentially constitutes "artificial acts of stimulative trading designed to mislead investors into

believeing [sic] there was a heavy market demand for" the stock. Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349, 1363 (N.D.Tex. 1979).[3]

The fact, however, that a party's activity may affect market price cannot be the basis for a federal securities violation in the absence of deception. This was pointed out by Congress at the time the Securities Exchange Act was adopted:

> Any extensive purchases or sales are bound to cause changes in the market price of the security, but mere knowledge on the part of the purchaser or seller that his transaction will have this effect is not sufficient to bring him within the scope of this provision.

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3 Plaintiff has attempted to distinguish some of these cases by arguing that they are inapplicable because they are based on Rule 10b-5 instead of Section 14(e). This is a highly technical distinction. Except for the "in connection" requirement of Rule 10b-5, the two provisions are substantially the same. See, e.g., Smallwood v. Pearl Brewing Co., 489 F.2d 579, 605 (5th Cir.), cert. denied, 419 U.S. 873 (1974); Bucher v. Shumway, [1979-1980 Transfer Binder] Fed. Sec. L.

> Thus, if a person is merely trying to acquire a large block of stock for investment, or desires to dispose of a big holding, his knowledge that in doing so he will affect the market price does not suffice to make his actions unlawful.

S. Rep. No. 792, 73d Cong., 2d Sess. 17 (1934).

Thus, if the ordinary investor is able to reasonably point to a disclosed basis for the price change of a particular stock, there has not been manipulation under the Williams Act. It is when the activity in question is done in such a manner that the reason for the artificial change in price is undetectable by the ordinary investor that there is manipulation.

Applying the above analysis to the instant case, the Court finds that the

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(Footnote continued from previous page) Rep. (CCH) ¶ 97,142, at 96,299 (S.D.N.Y. 1979), aff'd, 622 F.2d 572 (2d Cir.), cert. denied, 449 U.S. 841 (1980). In re Sunshine Mining Co. Securities Litig., [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,217, at 96,635-36 (S.D.N.Y. 1979).

amended complaint fails to state a claim for manipulation under Section 14(e) of the Williams Act. While it is true that the defendants' activities with respect to the tender offer did influence the price of the stock, the amended complaint fails to allege any deception by the defendants. All activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly. If the Court were to hold that defendants' actions in terminating the December tender offer and initiating the January tender offer constituted manipulation under Section 14(e), then potential offerors and managment of target companies would be subject to liability every time a tender offer is revised or negotiated. Some latitude must be given in the application of the Williams Act for it was designed to enhance market activity through open supply and demand, not artificially restrain it.

As noted at the outset, plaintiff relies upon Mobil Corp. v. Marathon Oil Corp., 669 F.2d 366 (6th Cir. 1981), to support its contention that the

activities complained of here amounted to manipulation. In that case, Marathon was the target of Mobil's unfriendly tender offer. In resisting the tender offer, Marathon entered into an agreement with U.S. Steel which granted the latter an option to purchase one of Marathon's most valuable assets in the event U.S. Steel was unable to effectuate a successful tender of its own for Marathon. Id. at 367-68. The Court of Appeals for the Sixth Circuit held that the "lock-up" option given to U.S. Steel constituted a manipulative practice because it foreclosed bidding for the acquisition of Marathon.

The plaintiff argues that the activities complained of here are of a similar nature and the reasoning of Mobil should be followed. This Court disagrees. The Mobil decision is not the law of this Circuit, and it also appears to be an aberration in this field of the law.[4] As the commentators contend, and

[4] Legal commentators have soundly criticized Mobil. See, e.g., Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule?, 8 J. of

this Court agrees, the Mobil decision is inconsistent with the rationale of the Santa Fe case. An analysis of the Williams Act shows that a key ingredient of a manipulative practice is deception, the direct opposite of disclosure, which the Santa Fe Court clearly pointed out. As that Court stated, "it repeatedly ... has described the 'fundamental purpose' of the Act as implementing a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the transaction is at most a tangential concern of the statute." 430 U.S. at 477-78.

The allegedly manipulative activity of withdrawing the December tender offer in violation of alleged contractual

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(Footnote continued from previous page.) Corp. Law 337, 353-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw.L.J. 975, 991-95 (1982); Note, The Future of Lock-Ups After Mobil Corp. v. Marathon Oil, 27 St. Louis U.L.J. 261, 281-82 (1983); Note, "Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act, 12 Seton Hall L. Rev. 881, 891-95 (1982).

arrangements was disclosed to the shareholders and the general public. Because there was no deception practiced upon the shareholders in terminating their alleged contractual rights, there was no manipulative violation within the meaning of Section 14(e) and defendants' motion to dismiss the manipulative claim will be granted.

B. Nondisclosure Claim

Plaintiff's second claim is that the nondisclosure of El Paso's grant of "golden parachutes" to its directors and the fact that these directors caused the withdrawal of the December tender offer and the initiation of the January offer for their personal gain constituted as Section 14(e) violation. Defendants contend that this so-called nondisclosure claim should likewise be dismissed.

Generally, the Williams Act requires the tender offeror to disclose material information to the shareholders of the target company. This Court, however, need not decide whether the alleged omissions are material, but even if they are, they are completely unrelated to the

damages alleged. Plaintiff avers that her damage was a result of the withdrawal of the Decmember tender offer. But even if the alleged undisclosed facts had been transmitted to the El Paso shareholders, it would nave had no effect whatsoever upon the withdrawal of the December offer, because it was R-H's management and not El Paso's shareholders who withdrew the December offer.[5]

This action is analogous to two cases where plaintiffs alleged injury due to withdrawal of tender offers for their stock, Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), and Lewis v. McGraw, 610 F.2d 192 (2d Cir.)(per curiam), cert. denied, 449 U.S. 951 (1980). In both cases, the plaintiffs sued under Section 14(e), contending that the tender offer materials contained misrepresentations. Both the Second and

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5 The defendants also argue that they properly disclosed this information and in any event they were under no obligation to do so. Because this Court has found sufficient grounds for dismissing this claim, it need not consider these arguments.

Seventh Circuits found in their respective cases that there was no Section 14(e) violation because the tender offers were withdrawn before the shareholders could rely upon them. Panter v. Marshall Field & Co., supra, 646 F.2d at 283-84; Lewis v. McGraw, supra, 619 F.2d at 195. Here the amended complaint fails to allege any causal nexus between the damage alleged by plaintiff -- that shareholders who tendered to the December offer could not fully participate in the January offer because of proration and were hence "deprived of the benefit of the $24 per share acquisition price originally proposed by defendants (D.I. 5, at 10) -- and the supposed omission of information in the January offer. Any failure to disclose the alleged breach of fiduciary duties by El Paso directors nad absolutely no relevance to plaintiff's alleged damanges. Consequently, the Court will dismiss plaintiff's so-called nondisclosure claim.

C. Pendent State Claims

Plaintiff's amended complaint vaguely asserts that defendants' conduct in

addition to violating Section 14(e) also violated "the principles of common law." Because this Court has dismissed the Williams Act claims, the only ones conferring subject matter jurisdiction upon the Court, the pendent state claims for breach of contract and breach of fiduciary duty will also be dismissed. The Supreme Court in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), instructed: "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." To the same effect are: Walck v. American Stock Exchange, Inc., 687 F.2d 778, 792 (3d Cir. 1982); Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir. 1976).[6]

CONCLUSION

This case is the perfect example of a plaintiff, who may have nonfrivolous

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[6] Because the Court has dismissed all the claims in the amended complaint, there is no need to rule on plaintiff's motion for class certification.

claims based on state law for breach of contract, tortious interference with contract, breach of fiduciary duties and perhaps even conspiracy, attempting to characterize those state law claims as violations of the federal securities laws. This ploy, however, has been foreclosed since Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977). In that case, the Supreme Court held that courts should be reluctant to federalize a substantial portion of corporate law traditionally left to state regulations. Accordingly, it will be the Delaware Chancery Court, in its pending action, which will appropriately decide those corporate law issues.

An order will be entered in accordance with this opinion.

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER, Plaintiff, v. BURLINGTON NORTHERN INC.) R-H HOLDINGS CORPORATION) THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M. R. ENGLER, JR., W.G. HENDERSON, R. S. MORRIS M. A. EHRILICH, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., and L. M. VAREN KAMP, Defendants.	)	Civil Action No. 83-13

ORDER

For the reasons set forth in the Court's Opinion entered in this case on this date, it is

ORDERED that the amended complaint is hereby dismissed.

Dated: June 27, 1983.

/s/
Chief Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

BARBARA SCHREIBER, Plaintiff, v. BURLINGTON NORTHERN INC.: R-H HOLDINGS CORPORATION: THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., R.S. MORRIS, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L.EMORY KATZ- ENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD, Defendants.	:	C. A. No. 83-13

NOTICE OF APPEAL

PLEASE TAKE NOTICE that plaintiff hereby appeals to the United States Court of Appeals for the Third Circuit from the Order of the United States District Court, District of Delaware, dated June 27, 1983, which dismissed her Complaint.

Dated: July 12, 1983

WILSON, WHITTINGTON, AULGUR
PINCUS, OHRENSTEIN, BIZAR
D'ALESSANDRO & SOLOMON

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Attorneys of Plaintiff

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-1504

BARBARA SCHREIBER,

Appellant

v.

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION and THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M. R. ENGLER, JR., W. C. HENDERSON, R. S. MORRIS, M. A. EHRLICH, A. M. DERRICK, RICHARD L. McCONN, D. J. MacIVER, JR. and L. M. VAREN KAMP, HOWARD BOYD, WILLIARD F. ROCKWELL, JR., W. D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, J. R. HUBBARD

On Appeal from the United States
District Court for the
District of Delaware
(C. A. No. 83-13)

Argued February 28, 1984

Before: ADAMS, SLOVITER, *Circuit Judges*,
and TEITELBAUM, *District Judge*•

(Opinion Filed April 2, 1984)

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• Hon. Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

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Directors

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Barbara Schreiber, a shareholder of El Paso Gas Company (El Paso), brought this action under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n(e) (1976) (the Williams Act) after she lost the opportunity to profit from a hostile tender offer by Burlington Northern, Inc. (Burlington)[1] when the offer was rescinded and a friendly but less lucrative offer was substituted. The district court dismissed her complaint, holding that she failed to state a claim for violation of § 14(e) because she alleged no injury resulting from deception. *Schreiber v. Burlington Northern, Inc.*, 568 F. Supp. 197, 201-04 (D. Del. 1983). While we are troubled by some of the conduct averred in the complaint, we agree with the district court that Schreiber's alleged injuries are not actionable under the Williams Act. Accordingly, we affirm.

I.

In late 1982, having purchased over one-half million shares of El Paso in the open market, Burlington decided to complete its takeover of El Paso by making a tender offer for 25.1 million shares at $24 per share (the December tender offer). Deeming the offer a hostile one, El Paso management countered with numerous defensive measures. But El Paso shareholders reacted favorably, fully subscribing to the offer by the December 30, 1982 deadline.

1. Burlington used a wholly owned subsidiary, R-H Holdings Corp., to execute the details of the takeover. In this opinion, Burlington and R-H will be referred to jointly as Burlington.

Burlington, however, never accepted those tendered shares. Instead, after negotiations with El Paso management, Burlington announced on January 10, 1983 the terms of a new and friendly takeover agreement. Pursuant to the new agreement, Burlington undertook to: (1) rescind the December tender offer; (2) substitute a new tender offer (the January tender offer) for only 21 million shares, at $24 per share; and (3) recognize "golden parachute"[2] contracts between El Paso and four of its officers. By February 8, more than 40 million shares were tendered in response to Burlington's January offer, and the take-over was completed.

For shareholders like Barbara Schreiber, who tendered in response to the December offer, Burlington's withdrawal of that offer proved costly. The January offer was greatly oversubscribed, and consequently those shareholders who re-tendered were subject to substantial proration. Seeking redress, Schreiber filed suit on behalf of herself and similarly situated shareholders, alleging that Burlington, El

2. So-called "golden parachutes" generally provide multi-year benefits to high level executives of a target company after a takeover if they are discharged without cause or downgraded by the new management. As described in the Schedule 14D-9 filed by El Paso with the Securities and Exchange Commission on January 12, 1983, the "employment agreements" with the four officers provided for their "continued employment with the Company in their current positions and at not less than their current salary levels" for periods of either three or five years. App. at S-29 to S-30. The Schedule 14D-9 also disclosed that El Paso's Deferred Compensation Plan had been amended "to provide that for the purposes of such Plan a participant shall be deemed to have retired at the instance of the Company if his duties as a director, officer or employee of the Company have been diminished or curtailed by the Company in any material respect." App. at S-29.

Paso, and members of the El Paso board violated § 14(e)'s prohibition of "fraudulent, deceptive, or manipulative acts or practices ... in connection with any tender offer." She claims that Burlington's willful breach of the December tender offer was a manipulative distortion of the market for El Paso stock. Schreiber also alleges that in the January offer Burlington failed to disclose the golden parachutes and the fact that El Paso management finally approved the takeover because of the favorable arrangements negotiated with Burlington. Plaintiff thus claims that this January nondisclosure was a deceptive act forbidden by § 14(e).

Ruling on defendants' motions under Fed. R. Civ. P. 12(b)(6), the district court held that neither of Schreiber's theories of recovery was legally sufficient and dismissed the suit on June 27, 1983. This appeal followed.

II.

Schreiber's first theory of recovery -- that Burlington engaged in manipulation when it cancelled the December tender offer -- seeks to convert an arguable breach of contract into a violation of the Williams Act. The district court rejected this effort, holding that § 14(e) proscribes only acts that artificially affect market price through deception.

The courts of appeals are divided as to whether deception is a necessary element of the manipulative acts prohibited by § 14(e). In the first appellate decision directly to address this point, the Sixth Circuit held in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), that an option granted by a target company to a friendly bidder in order to block a hostile takeover attempt -- a "lock-up" option -- is a manipulative act within the scope of § 14(e), despite the lack of any deception. Since *Mobil*, however, the

Second Circuit has twice rejected efforts by hostile bidders to use § 14(e) to attack arrangements similar to the lock-up option. *Data Probe Acquis'n. Corp. v. Datalab, Inc.*, 722 F.2d 1 (2d Cir. 1983); *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757 (2d Cir. 1983). Both *Data Probe* and *Buffalo Forge* hold that Williams Act manipulation must involve misrepresentation -- that is, the omission or misstatement of material facts.

We believe that the Second Circuit's position, requiring some form of misrepresentation, represents a more accurate view of the Williams Act. As the legislative history and subsequent judicial interpretation of the Williams Act make clear, § 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers. Rather, § 14(e) was enacted principally as a disclosure statute, designed to insure that fully-informed investors could intelligently decide how to respond to a tender offer.[3] Considered in light of this philosophy of disclosure, withdrawal of the December offer did not violate § 14(e) since Burlington disclosed to the shareholders and to the general public the acts that allegedly constitute a breach of contract. In the analogous context of SEC Rule 10b-5, 17 C.F.R. § 240.10b-5 (1983), the Supreme Court has restricted the meaning of "manipulative device" to conduct "intended to mislead investors by artificially affecting

3. H.R. Rep. No. 1711, 90th Cong., 2d Sess. 11 (1968) (the Williams Act was "designed to make the relevant facts known so that shareholders have a fair opportunity to make their decisions"); S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967). *See* Edgar v. Mite Corp., 457 U.S. 624, 639 (1982); Piper v. Chris-Craft Industries, 430 U.S. 1, 31 (1977) (the Williams Act "was designed solely to get needed information to the investor"); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975).

market activity." *Santa Fe Ind. v. Green*, 430 U.S. 462, 477 (1977); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976). That narrow definition of manipulation reinforces our view that Burlington complied with § 14(e) by fully disclosing its withdrawal of the December offer.

Although we share the Sixth Circuit's concern about defensive strategies "expressly designed" to "artificially affect normal healthy market activity," *Mobil, supra*, 669 F.2d at 374, we decline to join that court's open-ended notion of manipulative acts. To be sure, in drafting § 14(e) Congress chose to prohibit not only "fraudulent" and "deceptive" acts or practices, but also the "manipulative" ones, and therefore arguably sought to reach a broader range of conduct than mere misrepresentation. *See Mobil, supra*, 669 F.2d at 376-77; *see also* Note, *Target Defensive Tactics as Manipulative Under Section 14(e)*, 84 Col. L. Rev. 228, 237-8 (1984). But if taken at face value, there is a danger that the *Mobil* holding would transform all decisions by bidders or by target management that affect a tender offer contest into "artificial" influences.[4] Absent a requirement of deception, the Williams Act

4. For scholarly criticism of the broad reach of the *Mobil* holding, *see, e.g.*, Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized to Overcome the Business Judgment Rule? 8 J. of Corp. Law, 337, 353-58; Profusek, Tender Offer Manipulation: Tactics and Strategies After Marathon, 36 Sw.L.J. 975, 991-95 (1982); Note, The Future of Lock-Ups After Mobil Corp. v. Marathon Oil, 27 St. Louis U.L.J. 261, 281-82 (1983); Note, "Lock-Up" Enjoined Under Section 14(e) of Securities Exchange Act, 12 Seton Hall L. Rev. 881, 891-95 (1982). *But see* Target Defensive Tactics, *supra*, 84 Col. L. Rev. at 252-62; Note, Section 14(e) of the Williams Act: Can There Be Manipulation with Full Disclosure or Was the Mobil Court Running on Empty?

would mandate that the federal courts supervise the substantive fairness of practically all tender offers. Mindful of the Supreme Court's instruction in *Santa Fe* that we should be reluctant to federalize state corporate law, 430 U.S. at 479, we reject *Mobil's* expansive view of § 14(e) and hold that deception is an essential element of a manipulative act.

Schreiber's second theory of recovery -- that Burlington failed to disclose the golden parachutes and the fact that such favors persuaded El Paso management to grant approval of the January offer -- does incorporate a claim of deception. As the district court correctly recognized, however, the alleged January nondisclosure was not causally linked to Schreiber's damages. The losses she sustained were the result of Burlington's decision to cancel the December offer, a decision unaffected by Burlington's alleged nondisclosure in the January offer. Even if Burlington had made full disclosure in the January offer, this information would have made no difference to shareholders like Schreiber, whose injury had already been caused by the December rescission. Lacking a causal link between the alleged misrepresentation and the injuries, Schreiber's second theory also fails.

III.

Our decision today by no means constitutes an endorsement of the conduct which the complaint attributes to the defendants. Of special concern to us are Schreiber's averments that El Paso management breached its fiduciary duty to stockholders when it negotiated such self-serving arrangements as the golden parachutes. Nonetheless, in the wake of *Sante Fe's* instruction that "once full and fair disclosure has occurred, the fairness of the transaction is at most a

tangential concern of the statute," 430 U.S. at 477-78, we are constrained to hold, until Congress directs otherwise, that shareholders like Schreiber must rely on the remedies provided by state law.

Accordingly, the judgment of the district court will be affirmed.

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5. Currently pending in the Delaware Court of Chancery is a certified class action on behalf of the same class that Schreiber seeks to represent here. Gilbert & Steiner v. The El Paso Co. and Burlington Northern Inc. (Del. Ch. Consol. Civ. Act. Nos. 7075 & 7079). The plaintiffs in that case assert under state law substantially the same claims for breach of contract and breach of fiduciary duty that Schreiber presses before us here.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Offer to Purchase for Cash

Up to 25,100,000 Shares of Common Stock

of

THE EL PASO COMPANY

at

$24 Net Per Share

by

R-H HOLDINGS CORPORATION

A Wholly-Owned Subsidiary

of

BURLINGTON NORTHERN INC.

THE PRORATION PERIOD WILL EXPIRE AT 12:00 MIDNIGHT, NEW YORK CITY TIME, ON THURSDAY, DECEMBER 30, 1982. THE WITHDRAWAL DEADLINE IS 12:00 MIDNIGHT, NEW YORK CITY TIME, ON WEDNESDAY, JANUARY 12, 1983. THE OFFER WILL EXPIRE AT 12:00 MIDNIGHT, NEW YORK CITY TIME, ON WEDNESDAY, JANUARY 19, 1983, UNLESS EXTENDED.

THE OFFER IS NOT CONDITIONED UPON ANY MINIMUM NUMBER OF SHARES BEING TENDERED.

IMPORTANT

Stockholders desiring to tender their Shares should either (1) complete and sign the Letter of Transmittal or a facsimile therof, have their signature thereon guaranteed if required by Instruction 1 of the Letter of Transmittal and forward the Letter of Transmittal with their stock certificates and any other required documents to the Depositary or (2) request their broker, dealer, commercial bank, trust company or other nominee to effect the transaction for them. See Section 5. Stockholders having Shares registered in the name of a broker, dealer, commercial bank, trust company or other nominee must contact such person if they desire

to such Shares. Stockholders who desire to tender Shares and whose certificates for such Shares are not immediately available should tender such Shares by following the procedures for guaranteed delivery set forth in Section 5.

Questions and requests for assistance may be directed to the Dealer Manager or the Information Agent at their respective addresses and telephone numbers set forth on the back cover page of this Offer to Purchase. Requests for additional copies of the Offer to Purchase and the Letter of Transmittal may be directed to the Information Agent, the Dealer Manager or to brokers, dealers, commercial banks or trust companies.

The Dealer Manager for the Offer is:

Shearson/American Express Inc.

December 21, 1982

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To the Holders of Common Stock of

The El Paso Company:

R-H Holdings Corporation, a Delaware corporation (the "Purchaser") and a wholly-owned subsidiary of Burlington Northern Inc., a Delaware corporation ("BNI"), hereby offers to purchase up to 25,100,000 shares of Common Stock, par value $3 per share (shares of Common Stock being hereinafter referred to as "Shares"), of The El Paso Company, a Delaware corporation (the "Company"), for $24 per Share net to the seller in cash, upon the terms and subject to the conditions set forth in this Offer to Purchase and in the related Letter of Transmittal (which together constitute the "Offer"). Tendering stockholders will not be obligated to pay brokerage commissions or, except as set forth in Instruction 6 of the Letter of

Transmittal, stock transfer taxes on the purchase of Shares by the Purchaser. The Purchaser will pay all charges and expenses of the Depositary and the Information Agent.

According to the Company's Quarterly Report on form 10-Q for the quarter ended September 30, 1982 (the "Company's Third Quarter 10-Q"), 49,541,596 Shares were outstanding as of October 20, 1982, and, as of September 30, 1982, an additional 1,519,756 Shares were issuable upon conversion of the Company's outstanding 13% convertible subordinated notes. According to the Company's Annual Report on Form 10-K for the year ended December 31, 1981 (the "Company's 1981 10-K"), 155,789 Shares were reserved for issuance as of that date pursuant to the employee stock option plans, of which 148,797 Shares were

issuable upon exercise of the then outstanding stock options. BNI owns beneficially 537,800 Shares (or 1.1% of the presently outstanding Shares). See Section 9. 25,100,000 Shares, together with the 537,800 Shares beneficially owned by BNI, constitute approximately 51.8% of the Shares reported outstanding as of October 20, 1982, and 50.1% of those outstanding Shares, together with the Shares issuable upon the conversion of the foregoing convertible securities and upon exercise of the foregoing options.

The Offer is not conditioned on any minimum of Shares being tendered.

1. **Terms of the Offer; Proration.** Upon the Terms and subject to the conditions of the Offer, the Purchaser will accept for payment and purchase up to 25,100,000 Shares which are validly

tendered at or prior to the Expiration Date and not withdrawn in accordance with Section 3 of this Offer to Purchase. The Purchaser expressly reserves the right to purchase additional Shares pursuant to the Offer, although it has no current intention to do so. The "Expiration Date" for the Offer shall be 12:00 Midnight, New York City Time, on Wednesday, January 19, 1983, unless the Purchaser shall, in its sole discretion, have extended the Offer, in which event the term "Expiration Date" shall mean the latest time and date on which the Offer as so extended by the Purchaser shall expire.

The manner in which the Purchaser will purchase validly tendered Shares, upon the terms and subject to the conditions of the Offer, will depend on whether the Offer is over-subscribed by

Shares validly tendered at or prior to 12:00 Midnight, New York City Time, on Thursday, December 30, 1982 (the "Proration Date"), and not withdrawn in accordance with Section 3. If more than 25,100,000 Shares (or any greater number of Shares which the Purchaser elects to purchase pursuant to the Offer) are validly tendered at or prior to the Proration Date and not withdrawn, then (i) upon the terms and subject to the conditions of the Offer, Shares so tendered will be purchased, on a pro rata basis (with appropriate adjustments to avoid purchases of fractional Shares), according to the number of Shares validly tendered by each stockholder at or prior to the Proration Date and not withdrawn, and (ii) subject to the right of the Purchaser after the Proration Date to increase the number of Shares

which it elects to purchase pursuant to the Offer, Shares tendered after the Proration Date will not be purchased. If fewer than 25,100,000 Shares (or any greater number of Shares which the Purchaser elects to purchase pursuant to the Offer) are validly tendered at or prior to the Proration Date and not withdrawn, then, upon the terms and subject to the conditions of the Offer, the Purchaser will purchase all Shares so tendered and not withdrawn, and any Shares validly tendered thereafter and at or prior to the Expiration Date and not withdrawn will, upon the terms and subject to the conditions of the Offer, be purchased on a first-come, first-served basis until 25,100,000 Shares (or any greater number of Shares which the Purchaser elects to purchase pursuant to the Offer) have been purchased.

Because of the difficulty of determining the precise number of Shares validly tendered and not withdrawn, the Purchaser does not expect that it will be able to announce the final proration factor, if prorating of tendered Shares is required, until approximately nine New York Stock Exchange ("NYSE") trading days after the Proration Date. Preliminary results of proration will be announced by press release as soon as practicable after the Proration Date. Holders of Shares may obtain such preliminary information from the Information Agent and the Dealer Manager, and may be able to obtain such information from their brokers.

The Purchaser expressly reserves the right, at any time, or from time to time, to extend the period of time during which the Offer is open by giving

oral or written notice of such extension to the Depositary. The Purchaser also expressly reserves the right (i) to terminate the Offer and not accept for payment any Shares not theretofore accepted for payment upon the occurrence of any of the conditions set forth in Section 15 hereof, by giving oral or written notice of such termination to the Depositary and (ii) at any time, or from time to time, to amend the Offer. Any such extension, termination or amendment will be followed as promptly as practicable by public announcement thereof, such announcement in the case of an extension to be made no later than 10:00 A.M., New York City Time, on the next business day after the previously scheduled Expiration Date. Without limiting the manner in which the Purchaser may choose to make any such public announcement, the Purchaser shall

have no obligation to publish, advertise or otherwise communicate any such public announcement, otherwise than by making a release to the Dow Jones News Service.

A request is being made to the Company for the use of its stockholder lists and security position listings for the purpose of disseminating the Offer to holders of Shares. The Offer to Purchase and Letter of Transmittal will be mailed to record holders of Shares and will be furnished to brokers, banks and similar persons whose names, or whose nominees, appear on the stockholder lists or, if applicable, who are listed as participants in a clearing agency's security position listing, for subsequent transmittal to beneficial owners of Shares.

2. **Acceptance for Payment and Payment.** Upon the terms and subject to the conditions of the Offer (including, if the Offer is extended, the terms and conditions of any such extension), the Purchaser will purchase, by accepting for payment, and will pay for, Shares validly tendered and not withdrawn, as promptly as practicable after the latest of: (i) 12:00 Midnight, New York City Time, on Wednesday, January 12, 1983 or, at the option of the Purchaser, the Expiration Date; (ii) the expiration of the waiting period applicable to the consummation of the Offer under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Hart-Scott Act") and (iii) with respect to any Shares not theretofore accepted for payment as provided herein, the expiration of any additional withdrawal period resulting

from the commencement of a tender offer for Shares by another bidder (other than the Company), as described in Section 3.

BNI delivered a Notification and Report Form under the Hart-Scott Act prior to 5:00 P.M., Eastern Standard Time, on December 20, 1982 to both the Federal Trade Commission (the "FTC") and the Antitrust Division of the Department of Justice (the "Antitrust Division"), and, accordingly, BNI believes that the waiting period under the Hart-Scott Act applicable to the Offer will expire at 11:59 P.M., New York City Time, on Tuesday, January 4, 1983. However, because funding for certain federal agencies, including the FTC and the Department of Justice, lapsed, the Premerger Notification Office of the Bureau of Competition of the FTC advised BNI of its position that the waiting period under the Hart-

Scott Act would not commence until the first business day after funding is restored. Prior to the expiration of the waiting period, the FTC or the Antitrust Division may extend the waiting period by requesting additional information or documentary material from BNI. If such a request is made, the waiting period will expire at 11:59 P.M., New York City Time, on the tenth day after the date of substantial compliance by BNI with such request. Thereafter, the waiting period can be extended only by court order. For additional information regarding the Hart-Scott Act, see Section 13.

For purposes of the Offer, the Purchaser shall be deemed to have accepted for payment (and thereby purchased) tendered Shares if, as and when the Purchaser gives oral or written

notice to the Depositary, as agent for tendering stockholders, of its acceptance for payment of such Shares pursuant to the Offer. Payment for Shares purchased pursuant to the Offer will be made by deposit of the purchase price therefor with the Depositary, which will transmit payments to tendering stockholders thereafter. Under no circumstances will interest on the purchase price for Shares be paid by the Purchaser, regardless of any delay in transmitting such payments. If any tendered Shares are not purchased, or if certificates are submitted for more Shares than are tendered, certificates for the unpurchased Shares will be returned, without expense to the tendering stockholder, as promptly as possible following the expiration or termination of the Offer.

The Purchaser reserves the right to transfer or assign to BNI, or to one or more affiliates or direct or indirect subsidiaries of BNI (other than Burlington Northern Railroad Company or any of its subsidiaries), the right to purchase Shares tendered pursuant to the Offer, but any such transfer or assignment will not relieve the Purchaser of its obligations under the Offer and will not prejudice the rights of tendering stockholders to receive payment for Shares properly tendered and accepted for payment.

3. **Withdrawal Rights.** Except as otherwise set forth in this Section, tenders of Shares made pursuant to the Offer are irrevocable. Shares tendered pursuant to the Offer may be withdrawn at any time prior to 12:00 Midnight, New York City Time, on Wednesday, January 12, 1983, and, unless theretofore

purchased by the Purchaser pursuant to the Offer, may also be withdrawn at any time after Friday, February 18, 1983. In addition, if another bidder (other than the Company) commences a tender offer for some or all of the Shares, Shares tendered pursuant to the Offer which have not theretofore been accepted for payment by the Purchaser as provided herein may also be withdrawn on the date of, and for a period of ten business days after, the commencement (other than by public announcement as described in Rule 14d-2(b) promulgated under the Securities Exchange Act of 1934 (the "Exchange Act")) of such competing offer, provided that the Purchaser has received notice or otherwise has knowledge of such competing offer. For purposes of the Offer, a "business day" means any day other than a Saturday,

Sunday or federal holiday, and consists of the time period from 12:01 A.M. through 12:00 Midnight, New York City Time.

For a withdrawal to be effective, a written, telegraphic, telex or facsimile transmission notice of withdrawal must be timely received by the Depositary at the address set forth on the back cover page of this Offer to Purchase. Any notice of withdrawal must specify the name of the tendering stockholder, the number of Shares to be withdrawn and the name of the registered holder(s) of the certificates evidencing such Shares, if different from that of the tendering stockholder. If certificates for Shares have been delivered or otherwise identified to the Depositary, then prior to the physical release of such certificates, the tendering stockholder must

also submit the serial numbers shown on the particular certificates evidencing such Shares, and the signature on his notice of withdrawal must be guaranteed by a member firm of a registered national securities exchange or a member of the National Association of Securities Dealers, Inc. ("NASD") or by a commercial bank or trust company having an office or correspondent in the United States (an "Eligible Institution"). All questions as to the form and validity (including time of receipt) of notices of withdrawal will be determined by the Purchaser, in its sole discretion, whose determination shall be final and binding. Any Shares withdrawn will be deemed not properly tendered for purposes of the Offer. However, withdrawn Shares may be re-tendered, by following any of the procedures described in

Section 5, at any subsequent time prior to the expiration of the Offer.

4. **Certain Tax Consequences.** Sales of Shares by stockholders of the Company pursuant to the Offer will be taxable transactions for federal income tax purposes, and may also be taxable transactions for state, local and other tax purposes.

A stockholder who receives cash pursuant to the Offer in exchange for his Shares will recognize gain or loss for federal income tax purposes equal to the difference between the amount of cash received and the stockholder's tax basis in the Shares tendered. If the stockholder holds his Shares as a capital asset at the time of such sale, such gain or loss will be long-term or short-term capital gain or loss, depending on whether the holding period for such

Shares is more than 12 months or is 12 months or less.

The above discussion may not be applicable to a stockholder who acquired his Shares pursuant to the exercise of an employee stock option or otherwise as compensation.

This federal tax discussion is for general information only. Each stockholder is urged to consult his own tax advisor as to the particular tax consequences of the Offer to him, including the effect and applicability of state, local, foreign and other tax laws.

5. **Procedure for Accepting the Offer and Tendering Shares.** In order for a holder of Shares to tender any of his Shares pursuant to the Offer, certificates for such Shares, together with a properly completed and duly executed Letter of Transmittal or facsimile

thereof, with any required signature guarantees and any other required documents, must be received by the Depositary at any of its addresses set forth on the back cover page of this Offer to purchase at or prior to the desired date of tender, which must be at or prior to the Expiration Date, or the tendering stockholder must comply with the guaranteed delivery procedures set forth below. **Because of the possibility of the Offer's being over-subscribed, in order for stockholders to ensure participation in any proration pool, stockholders must properly tender their Shares at or prior to the Proration Date.** See Section 1. Signatures on all Letters of Transmittal must be guaranteed by an Eligible Institution unless the Shares tendered pursuant thereto are tendered (i) by a registered holder of

Shares who has not completed the box entitled "Special Payment Instructions" or the box entitled "Special Delivery Instructions" on the Letter of Transmittal or (ii) for the account of any Eligible Institution. If the certificates are registered in the name of a person other than the signer of the Letter of Transmittal, the certificates must be endorsed or accompanied by appropriate stock powers, in either case signed exactly as the name or names of the registered owner or owners appear on the certificates, with the signatures on the certificates or stock powers guaranteed as aforesaid.

The method of delivery of certificates for Shares and all other required documents is at the election and risk of the owner, but if sent by mail, it is recommended that they be sent by

registered mail, with return receipt requested, properly insured.

If a stockholder desires to tender Shares pursuant to the Offer and that stockholder's certificates for Shares are not immediately available or such stockholder cannot deliver his certificates and all other required documents to the Depositary on or prior to the desired date of tender, such Shares may nevertheless be tendered, provided that all of the following conditions are satisfied:

(a) the tender is made by or through an Eligible Institution;

(b) a properly completed and duly executed Notice of Guaranteed Delivery substantially in the form provided by the Purchaser is received by the Depositary as provided below on or prior to the desired date of tender, which must

be at or prior to the Expiration Date; and

(c) the certificates for all tendered Shares, in proper form for transfer, together with a properly completed and duly executed Letter of Transmittal or facsimile copy thereof and all other documents required by the Letter of Transmittal are received by the Depositary within eight NYSE trading days after the date of such Notice of Guaranteed Delivery.

The Notice of Guaranteed Delivery may be delivered by hand or transmitted by telegram, telex, facsimile transmission or mail to the Depositary and must include a guarantee by an Eligible Institution in the form set forth in the Notice.

In all cases payment for Shares tendered pursuant to the Offer will be made by the Depositary only after receipt by the Depositary of certificates therefor, a properly completed and duly executed Letter of Transmittal or a facsimile copy thereof and all other required documents.

A tender of Shares by any of the procedures set forth above will constitute a binding agreement between the tendering stockholder and the Purchaser in accordance with the terms and subject to the conditions set forth in the Offer.

By executing the Letter of Transmittal as set forth above, the stockholder irrevocably appoints designees of the Purchaser as proxies, with full power of substitution, to the extent of such stockholder's rights with respect

to the Shares tendered thereby and purchased by the Purchaser (and any and all other shares of capital stock and such other securities issued or issuable in respect of such Shares on or after December 17, 1982). Such appointment will become effective when, and only to the extent that, the Purchaser purchases those Shares as proved herein. Upon such acceptance for payment, all prior proxies given by such stockholder with respect to the purchased Shares or such other securities will, without further action, be revoked and no subsequent proxies will be effective. The Purchaser's designees will, with respect to those Shares and other securities, be empowered to exercise all voting and other rights of those stockholders as the Purchaser and its designees in their sole discretion may deem proper in

respect of any annual, special or adjourned meeting of the Company's stockholders, or consent in lieu of any such meeting or otherwise.

All questions as to the form of all documents and the validity, eligibility (including time of receipt) and acceptance of tendered Shares will be determined by the Purchaser, in its sole discretion, whose determination will be final and binding. The Purchaser reserves the absolute right to reject any or all tenders of any particular Shares which are not in appropriate form or the acceptance of which would, in the opinion of the Purchasers' counsel, be unlawful. The Purchaser also reserves the absolute right to waive any of the conditions of the Offer or any defect or irregularity in the tender of any Shares, and the Purchasers' interpretion

of the terms and conditions of the Offer (including the letter of Transmittal and the instructions thereto) will be final. No tender of Shares will be deemed to have been properly made until all defects and irregularities have been cured or waived. BNI, the Purchaser, the Depositary, the Dealer Manager and the Information Agent shall not be under any duty to give notification of any defects or irregularities in tenders and shall not incur any liability for failure to give any such notification.

6. **Price Range of Shares; Dividends.** The Shares are listed and principally traded on the NYSE, and are listed and traded on the Midwest and Pacific Stock Exchanges. The high and low sales prices of the Shares on the Composite Tape by calendar quarter from January 1, 1980, and the dividends paid

in each such quarter, as reported in published financial sources, are as follows:

	High	Low	Dividends
1980:			
First Quarter	$30½	$16¼	$.37
Second Quarter	22⅞	15¾	.37
Third Quarter	24⅞	19½	.37
Fourth Quarter	29½	22	.37
1981:			
First Quarter	25¾	19¼	.37
Second Quarter	25½	20⅞	.37
Third Quarter	28⅛	20¼	.37
Fourth Quarter	26⅛	23¼	.37
1982:			
First Quarter	28⅛	20½	.37
Second Quarter	25⅜	17⅜	.37
Third Quarter	22½	13⅜	.37
Fourth Quarter (through December 20, 1982)	19¾	16	.37

The last reported sales price of the Shares on the Composite Tape on Monday, December 20, 1982, the last full trading day prior to the public announcement of the Offer, was $18-1/4 per Share.

Stockholders are urged to obtain a current market quotation for the Shares.

7. **Effect on Market for the Shares; Regist ation Under the Exchange Act.** The purchase of Shares pursuant to the Offer will reduce the number of Shares that might otherwise trade publicly and could adversely affect the liquidity and market value of the remaining Share held by the public.

According to the Company's Annual Report to Stockholders for the year ended December 31, 1981 (the "Company's 1981 Annual Report"), there were approximately 98,447 record holders of Shares at December 31, 1981, and, according to the Company's Third Quarter 10-Q, there were 49,541,596 Shares outstanding as of October 20, 1982. Published guidelines of the NYSE indicate that it would consider delisting the outstanding Shares if there were fewer than 1,200 holders of 100 or more Shares, if the number of publicly-held Shares were less than 600,000 or if the aggregate market value of the publicly-held Shares did not exceed $5 million. The Purchaser does not believe that its purchases of Shares pursuant to the Offer will result in the delisting of the Shares by the NYSE, the Midwest Stock Exchange or the Pacific Stock Exchange.

If all such Exchanges were to delist the Shares, it is possible that the Shares would continue to trade in the over-the-counter market and that price quotations would be reported by the NASD through the National Association of Securities Dealers Automated Quotation System, Inc. ("NASDAQ") or other sources. The extent of the public market for the Shares and the availability of such quotations would, however, depend upon the number of stockholders remaining at such time, the interest in maintaining a market in the Shares on the part of securities firms, the possible termination of registration under the Exchange Act, as described below, and other factors. The Shares are presently "margin securities" under the rules of the Board of Governors of the Federal Reserve System, which has the

effect, among other things, of allowing brokers to extend credit with such securities as collateral. Depending on factors similar to those described above, the Shares might no longer constitute "margin securities" for purposes of the Federal Reserve Board's margin regulations and, therefore, could no longer be used as collateral for loans made by brokers. The Purchaser does not believe that its purchases of Shares pursuant to the Offer will result in the Shares no longer constituting "margin securities."

The Shares are registered under the Exchange Act. Such registration may be terminated upon application of the Company to the Securities and Exchange Commission (the "Commission") if the outstanding Shares are not listed on a national securities exchange and there are fewer than 300 holders of record of

Shares. The termination of the registration of the Shares under the Exchange Act would reduce the information required to be furnished by the Company to its stockholders and to the Commission and would make certain of the provisions of the Exchange Act, such as the short-swing profit recovery provisions of Section 16(b) and the requirement of furnishing a proxy statement in connection with stockholders' meetings, no longer applicable to the Company. Furthermore, "affiliates" of the Company and persons holding "restricted securities" of the Company might not be able to dispose of such securities pursuant to Rule 144 promulgated under the Securities Act of 1933. If registration of the Shares under the Exchange Act were terminated, the Shares would not longer be "margin securities" or eligible for

NASDAQ reporting. The Purchaser does not believe that its purchase of Shares pursuant to the Offer will result in the Shares becoming eligible for deregistration under the Exchange Act.

8. **Certain Information Concerning the Company.** The Company is a Delaware corporation, with its principal executive offices at 2727 Allen Parkway, Houston, Texas 77019.

According to the Company's 1981 Annual Report, the Company is a diversified energy company, the principal activities of which are natural gas and oil exploration and production, natural gas liquids operations, natural gas transmission and chemical manufacturing.

Set forth below is certain selected consolidated financial information for the Company's last three fiscal years, which was excerpted or derived from the

Company's 1981 Annual Report, and for the nine months ended September 30, 1981 and 1982, which was excerpted or derived from the Company's Third Quarter 10-Q and its Quarterly Report on Form 10-Q for the quarter ended September 30, 1981. More comprehensive financial information is included in such reports and other documents filed by the Company with the Commission, and the following summary is qualified in its entirety by reference to such reports and other documents and all of the financial information (including any related notes) contained therein. Such reports and other documents may be examined and copies may be obtained in the manner set forth below.

THE EL PASO COMPANY AND SUBSIDIARIES

Selected Consolidated Financial Information

(In Millions, Except Per Share Data)

	Year Ended December 31,		
	1979	1980	1981
CONSOLIDATED STATEMENT OF INCOME			
Operating Revenues	$2,395	$3,204	$3,909
Income from Continuing Operations	111	109	147
Net Income (Loss)	138	(303)	147
Earnings (Loss) per Common Share			
From Continuing Operations	2.40	2.30	3.07
Discontinued Operations			
Income (Loss) From Discontinued Operations	.59	(.98)	—
Loss on Discontinuance	—	(7.72)	—
Net Income (Loss)	2.99	(6.40)	3.07

JA-100

	Nine Months Ended September 30,	
	1981	1982
	(Unaudited)	
Operating Revenues	$2,781	$2,845
Income before Extraordinary Gain	108	66
Net Income	108	72
Earnings per Common Share		
Income before Extraordinary Gain	2.26	1.35
Net Income	2.26	1.47

	December 31,		September 30,	
	1980	1981	1981	1982
			(Unaudited)	
CONSOLIDATED BALANCE SHEET				
Net Working Capital (Current Assets Less Current Liabilities)	$ (238)	$ (254)	$ (285)	$ (245)
Total Assets	3,025	3,711	3,456	4,075
Long-Term Debt, Less Current Maturities	1,169	1,253	1,151	1,564
Long-Term Debt to be Retired by Security Fund	20	50	43	23
Stockholders' Equity	436	531	506	565

JA-101

According to the Company's Third Quarter 10-Q:

"[The Company] discontinued its LNG operations as of 1980. The discontinued operations included three LNG tankers delivered to [the Company] under an insurance settlement completed in October 1980. LNG activities continue to be directed toward maximizing the liquidation value of the LNG assets.

"In February 1982, [the Company] sold two of the three tankers covered by the insurance settlement as discussed in [the Company's] 1981 Annual Report on Form 10-K. An overall provision for loss on termination was provided in the 1980 financial statements. Final overall determination of the outcome of asset disposal is still dependent upon realization from all LNG assets. Consequently, no gain

or loss on individual transactions (including the aforementioned sale) will be recognized for financial purposes. Management believes that the ultimate outcome of the overall termination will not result in any material adjustment to the loss recognized in 1980.

"The balance in 'Long-term debt to be retired by Security Fund' as shown in the accompanying balance sheet at September 30, 1982 and December 31, 1981 consists of the following:

	1982	1981
	(in thousands)	
Long-term debt including current maturities..	$72,347	$223,565
Insurance proceeds receivable.....	(23,333)	(140,000)
Security Fund balance.....	(26,402)	(33,587)
	$22,612	$ 49,978

"Such debt has been shown separately inasmuch as the insurance settlement established a Security Fund which, by its terms, is pledged to retire such debt. Insurance proceeds to be received (less certain lay-up and other

expenses) together with proceeds from sales of vessels must be deposited in such fund until it is sufficient to retire the debt."

The Company is subject to the informational filing requirements of the Exchange Act and, in accordance therewith, is required to file reports and other information with the Commission relating to its business, financial condition, and other matters. Information as of particular dates concerning the Company's operating results, financial condition, directors and officers, their remuneration and options granted to them, the principal holders of the Company's securities and any material interest of such persons in transactions with the Company, and other matters required to be disclosed in proxy statements and annual reports distributed to

the Company's stockholders is filed with the Commission, and may be inspected at the Commission's public reference facilities at 450 Fifth Street, N.W., Washington, D.C., and should be available for inspection at the regional offices of the Commission in New York (Room 1102, 26 Federal Plaza), Chicago (Room 1204, 219 South Dearborn Street) and Los Angeles (Suite 1710, 10960 Wilshire Boulevard). Copies may be obtained by mail, upon payment of the Commission's customary fees, from the Commission's principal office at 450 Fifth Street, N.W. Washington, D.C. 20549. Such material should also be available for inspection at the offices of the NYSE, 20 Broad Street, New York, New York, the Midwest Stock Exchange, 120 South LaSalle Street, Chicago, Illinois, and the Pacific Stock Exchange, 618 South

Spring Street, Los Angeles, California, and 301 Pine Street, San Francisco, California.

Except as otherwise set forth herein, the information concerning the Company contained in this Offer to Purchase has been taken from or is based upon publicly available documents and records on file with the Commission and other publicly available information. Although the Purchaser does not have any knowledge that would indicate that any statements contained herein based on such documents and records are untrue, the Purchaser cannot take responsibility for the accuracy or completeness of the information contained in such documents and records, or for any failure by the Company to disclose events which may have occurred or may affect the significance or accuracy of

any such information but which are unknown to the Purchaser.

9. **Certain Information Concerning BNI and the Purchaser.** The Purchaser, a Delaware corporation, is a wholly-owned subsidiary of BNI. The Purchaser was formed on December 15, 1982 for the purpose of making the Offer, and has not engaged in any business to date. The principal executive offices of the Purchaser and BNI are located at 1111 Third Avenue, Seattle, Washington 98101.

BNI, a Delaware corporation, was incorporated on March 27, 1981 as a holding company pursuant to a plan of reorganization under which all stockholders of Burlington Northern Railroad Company became stockholders of BNI.

The principal business activities of BNI are in transportation and natural resources. Transportation operations

are principally a major rail carrier system and common carrier motor freight. Natural resource activities include the sale of timber and logs from land owned by BNI and the manufacture and sale of forest products. Such activities also include the sale of crude oil and natural gas, and the ownership of working interests and royalties and the granting of leases relating to the exploration, development and production of oil, gas, coal, iron ore and taconite, and other minerals. BNI also derives revenues from real estate sales, rentals and developments, and other minor operations.

The name, citizenship, business address, and present principal occupation or employment of each of the directors and executive officers of the Purchaser and BNI are set forth in Schedule A hereto.

Set forth below is certain selected consolidated financial information for BNI's last three fiscal years, which was excerpted and derived from BNI's Annual Report to Stockholders for the year ended December 31, 1981, and for the nine months ended September 30, 1981 and 1982, which was excerpted and derived from BNI's Quarterly Reports on Form 10-Q for the quarters ended September 30, 1981 and 1982. More comprehensive financial information is included in such reports and other documents filed by BNI with the Commission, and the following summary is qualified in its entirety by reference to such reports and other documents and all of the financial information (including any related notes) contained therein. Such reports and other documents may be examined and copies may be obtained in the

same manner as set forth in Section 8 with respect to the Company.

BURLINGTON NORTHERN INC. AND CONSOLIDATED SUBSIDIARIES

Selected Consolidated Financial Information

(In Millions, Except Per Share Data)

	Year Ended December 31,		
	1979	1980	1981
STATEMENT OF INCOME			
Revenues	$3,225	$3,954	$4,936
Net Income	176	223	272
Earnings per Common Share			
Primary	6.55	7.55	7.02
Assuming Dilution	5.50	6.63	7.02

	Nine Months Ended September 30,	
	1981	1982
	(unaudited)	
Revenues	$3,390	$3,101
Income From Continuing Operations	182	96
Income From Discontinued Operations	11	106
Net Income	193	202
Earnings Per Common Share		
Continuing Operations	4.67	2.42
Discontinued Operations Income	.29	.10
Gain on Sale of Discontinued Operations	—	2.74
Net Income	4.96	5.26

	December 31,		September 30,	
	1980	1981	1981	1982
BALANCE SHEET			(unaudited)	
Net Working Capital (Current Assets Less Current Liabilities)	$ 332	$ 360	$ 350	$ 509
Total Assets	5,267	5,674	5,489	5,819
Long-Term Debt	1,410	1,330	1,350	1,340
Common Stockholders' Equity—Net	2,431	2,629	2,577	2,773

BNI is currently the beneficial owner of 537,800 Shares (approximately 1.1% of the outstanding Shares), which were purchased in the open market during November and December 1982 by a wholly-owned subsidiary of BNI, at a total cost of $8,953,960 (including commissions) and at an average price per Share of $16.49 (excluding commissions). On December 16, 1982, that subsidiary transferred 100 Shares to the Purchaser.

Except for such Shares and except as may be set forth in Schedule A hereto, neither the Purchaser, BNI, nor to the best knowledge of the Purchaser and BNI, any of the persons listed on Schedule A hereto or any associate or majority-owned subsidiary of the Purchaser, BNI or any of the persons so

listed, beneficially owns or has a right to acquire any Shares, and neither the Purchaser, BNI, nor to the best knowledge of the Purchaser and BNI, any of the persons listed on Schedule A hereto, or any associate or majority-owned subsidiary of the Purchaser, BNI or any of the persons so listed, or any executive officer, director or subsidiary of any of the foregoing, has effected any transactions in Shares during the past 60 days.

Except as set forth in this Offer to Purchase, neither the Purchaser, BNI, nor to the best knowledge of the Purchaser and BNI, any of the persons listed on Schedule A hereto, has any contract, arrangement, understanding or relationship with any person with respect to any securities of the Company. Except as set forth in this Offer to Purchase,

since January 1, 1979, there have been no transactions that would require reporting under the rules of the Commission between the Purchaser, BNI, or, to the best knowledge of the Purchaser and BNI, any of the persons listed on Schedule A hereto, on the one hand, and the Company or any of its executive officers, directors or affiliates, on the other hand, and, except as set forth in this Offer to Purchase, since January 1, 1979, there have been no contacts, negotiations or transactions between the Purchaser, BNI or its subsidiaries or, to the best knowledge of the Purchaser and BNI, any of the persons listed on Schedule A hereto, on the one hand, and the Company or its affiliates, on the other hand, concerning a merger, consolidation or acquisition, a tender offer or other acquisition of securities, an

election of directors, or a sale or other transfer of a material amount of assets.

On January 7, 1981, in the United States District Court for the Western District of Washington, BNI pleaded guilty to, and on March 18, 1981 was convicted of, three counts of an indictment alleging that it had violated the Elkins Act, formerly 49 U.S.C. §41 (now codified at 49 U.S.C. §§11903 and 11915) by charging freight rates to a railroad customer at less than applicable tariffs. After further proceedings, BNI was sentenced to pay a fine of $20,000 on each count.

On September 20, 1978, in the United States District Court for the Western District of Washington, BNI pleaded guilty to, and was convicted of, two counts of an indictment alleging

that it had violated the Elkins Act by charging freight rates to another railroad customer at less than the applicable tariffs. BNI was sentenced to pay a fine of $20,000 on each count.

10. **Background of the Offer.** On December 20, 1982, Richard M. Bressler, Chairman and Chief Executive Officer of BNI, informed Travis H. Petty, Chairman and President of the Company, by telephone, of the Offer. In addition, on December 20, 1982, BNI delivered a letter to Mr. Petty. The text of that letter is as follows:

> "Dear Mr. Petty:
>
> We have long admired and respected your company and it management. After careful consideration and thorough analysis, we have determined that a majority holding in [the Company] by [BNI] makes sense. Indeed, we believe that this relationship would be beneficial to both our companies.
>
> Accordingly, our Board of Directors has authorized [BNI] to commence

> promptly a tender offer for approximately 51% of your company's common stock at $24 per share in cash.
>
> We believe that the price is a fair one. I am sure you will note that our offer affords your company's shareholders the opportunity to obtain immediately a significant premium over the current market price of your company's common shares.
>
> You should know that implicit in our investment proposal is our recognition of your company's management performance which we consider critical to the long-term growth of [the Company] and the success of our investment. We hope and expect that your company's management would continue its service uninterrupted. Indeed, in light of your experience and stature, we would expect to extend to you a position on our Board of Directors.
>
> My colleagues and I would welcome the opportunity to meet with you, your board or your representatives to discuss our offer. We sincerely hope that, together, we can proceed promptly toward the goal of assuring that the best interests of everyone concerned with this undertaking are served."

On September 24, 1982, the Dow Jones News Service reported the following news item:

[BNI] denies it will bid for [the Company]. [BNI] denied rumors that it was about to buy [the Company]. Those rumors according to securities analysts had driven the price of [the Company's] stock up as much as two points on heavy volume earlier today.

"There are no imminent plans to buy [the Company]." Said Allan Boyce, Vice President for Public Affairs at [BNI] "We are not making an offer."

However Boyce did say that [BNI], a diversified company with interests in railroads, air freight, mining and lumber is "interested in the posibility of acquisitions in the energy field."

[The Company's] Chairman, Travis Petty, issued a statement saying [the Company] did not know the reason for the heavy trading in its stock. It offered no further explanation.

Analysts however linked the surge in [the Company's] price to persistent rumors that [BNI] was about to bid for [the Company].

[The Company] currently is trading on the NYSE Composite at 21-1/8 up 1-5/8 on volume of 688,500 shares while [BNI] is off 1/8 to 43-3/4 on 223,100 shares.

Foster Corwith of Dean Witter Reynolds said he had received calls from people who had even told him that the tender offer would be made at $35 a share. But analysts generally agreed that [the Company]

was a bigger company than [BNI] was interested in buying.

"I heard that rumor yesterday morning" said Robert Long of First Boston "and I determined that it was not likely." Corwith said "[BNI] has a lot of money floating around. They might be able to handle a $700 to $800 million acquisition. But at $35 a share [the Company] would cost [BNI] an estimated $1.75 billion." Corwith estimated.

"My best shot is that it's too big for [BNI]" said John Kawa also with Dean Witter Reynolds "but anything's possible."

A spokeswoman for Rauscher Pierce Refsnes Inc. which also follows [the Company] quoted from what he called an "internal memo" which

stated that [the Company] was "genuinely surprised" at the upward price movement in [the Company] because there were "no announcements that could account for this activity."

The memo went on to say that a takeover would be "difficult considering its size." The memo said [the Company] had "a market capitalization of over $1 billion."

On September 24, 1982, a representative of an investment banker for the Company advised BNI that the Company was not interested in being acquired.

11. Purpose of the Offer. The Offer is being made for the purpose of acquiring a majority of the issued and outstanding Shares, thereby enabling BNI to control the business of the Company. If 25,100,000 Shares are purchased by

the Purchaser pursuant to the Offer, BNI would own beneficially approximately 51.8% of the issued and outstanding Shares (based on the number of Shares reported to be outstanding on October 20, 1982 in the Company's Third Quarter 10-Q), and BNI, through the Purchaser, would have the power under Delaware law and the Company's Certificate of Incorporation and By-Laws to cause the election of all of the Company's directors.

If, after the Offer, BNI beneficially owns a majority of the issued and outstanding Shares, BNI intends to cause the Purchaser promptly thereafter, consistent with applicable legal requirements, to act by written consent and without a meeting of the stockholders of the Company to elect as directors of the Company a sufficient number of nominees of BNI to constitute at least a majority

of the Board of Directors of the Company. BNI intends that such nominees will be selected from among the members of BNI's Board of Directors. For certain information regarding the members of BNI's Board of Directors, see Schedule A.

In addition, if after the Offer BNI beneficially owns a majority of the issued and outstanding Shares, or if it acquires a substantial percentage of those Shares (although less than a majority), BNI may seek to effect one or more transactions by which it would acquire beneficial ownership of the remaining Shares. Any possible transactions might be on terms (including the consideration offered per Share) the same as, or more or less favorable than, those of the Offer. A determination by BNI to seek to acquire the remaining

Shares will depend upon a number of considerations, including the Company's performance and prospects, its prevailing and prospective levels of cash flow, market, business and other general economic conditions, the level of interest rates, and other factors not now determinable. Such other factors include the outcome of an appeal, pending in the United States Supreme Court, of the decision of the United States Court of Appeals for the Fifth Circuit permitting the use by the Company of a gas pricing formula more favorable to the Company than that previously permitted to be used. The Court of Appeals held that price regulation for pipeline-produced gas, which had formerly been regulated by the Federal Energy Regulatory Commission under the Natural Gas Act of 1938 on the basis of "cost-of-service,"

with prices determined by reference to production costs and investment recovery, including a specified rate of return, is now subject to the provisions of the Natural Gas Policy Act of 1978, which sets certain uniform maximum lawful prices for gas production without reference to costs or specified rates of return. In addition, it may be necessary for BNI to obtain consents from its lender banks to acquire the remaining Shares. See Section 12.

If BNI were to determine to acquire the remaining Shares pursuant to a merger or similar business combination transaction, Delaware law and the Company's Certificate of Incorporation would require the approval of the Board of Directors of the Company and the affirmative vote of the holders of a majority of the outstanding Shares to

effect any such transaction. If the Purchaser purchases the 25,100,000 Shares sought in the Offer, BNI would beneficially own a majority of the outstanding Shares and the approval of such a business combination transaction by the stockholders would be assured.

If any such merger or other business combination transaction were to take place, holders of Shares may have certain rights to dissent and demand appraisal of their Shares under applicable Delaware law. If the statutory procedures were complied with, these rights could lead to a judicial determination of the fair value required to be paid to such dissenting holders for their Shares, exclusive of any element of value arising from the accomplishment or expectation of the merger or other transaction. The value so determined

could be more or less than the purchase price per Share offered pursuant to the Offer, or the merger or other transaction giving rise to the appraisal rights. Any such judicial determination of the fair value of Shares could be based upon considerations other than or in addition to the market value of the Shares, including asset values and earning capacity of the Company.

In addition, several recent decisions by the Delaware courts have held that a controlling stockholder of a company involved in a merger has a fiduciary duty to the other stockholders which requires that the merger be fair to such other stockholders. In determining whether a merger is fair to stockholders, the Delaware courts have considered, among other things, the type and amount of consideration to be received

by the stockholders and whether there is a valid business purpose for the transaction.

Moreover, any such merger or similar business combination transaction would have to comply with any applicable federal law then in effect. In particular, compliance with Rules 13e-3, promulgated under the Exchange Act, may be required. In such event, certain information relating to the fairness of the transaction and the consideration offered minority stockholders therein would be required to be filed with the Commission and disclosed to minority stockholders prior to the consummation of the transaction.

If, after the Offer, BNI beneficially owns less than a majority of the issued and outstanding Shares pursuant to the Offer, BNI may seek to acquire

additional Shares, as described below, and, depending on the number of Shares owned, may seek representation on the Company's Board of Directors, and otherwise to exercise significant influence over the Company's operating and financial policies. To accomplish these ends, consistent with applicable legal requirements, BNI may, among other things, solicit proxies to elect its nominees as directors (i) at the Company's next annual meeting of stockholders (which the By-Laws of the Company provide is to be held on the last Tuesday of April of every year), or (ii) prior thereto, at a special meeting of the Company's stockholders. Under the Company's By-Laws, stockholders holding a majority of the Company's voting power have the right to call a special stockholders' meeting, and BNI might seek to

join with other stockholders in making such a demand. In addition, under Delaware law and the Company's Certificate of Incorporation and By-Laws, the holders of a majority of the Company's voting power may act by written consent and without a meeting, and, therefore, BNI may, consistent with applicable legal requirements, solicit the written consent of other stockholders holding shares representing voting power that, together with the percentage of voting power beneficially owned by BNI, would be sufficient to elect BNI's nominees as directors of the Company.

In all events, BNI reserves the right, following the expiration or termination of the Offer, in conformity with all applicable legal requirements, to acquire additional shares or to dispose of any or all Shares beneficially owned

by it. Any such acquisition or disposition may be effected through private purchases or sales, open market transactions, future tender offers or otherwise, on terms and at prices which may be more or less favorable than those of the Offer.

BNI does not intend to change the management of the Company, the nature of the Company's business, or the location of its corporate headquarters. If BNI acquires control of the Company, BNI intends to seek additional information concerning the Company and its business and, based upon its review of that information, BNI may cause the Company to effect such changes in its business, corporate structure, capitalization, dividend policy and management as BNI deems appropriate. BNI does intend to evaluate the level of the Company's oil

and gas exploration expenditures and may consider means of coordinating the oil and gas exploration and production businesses of the Company and BNI, and, consistent with its fiduciary duties as a majority stockholder of the Company and depending upon the respective business needs, business policies and financial condition of the Company and BNI and other relevant business factors, BNI may allocate opportunities for oil and gas exploration and production to either the Company or to itself or to both.

Except as set forth in this Offer to Purchase, BNI has no specific plans or proposals with respect to any extraordinary corporate transaction, such as a merger, reorganization or liquidation involving the Company or any of its subsidiaries or a sale or transfer of a material amount of assets of the Company

or any of its subsidiaries, or a change in the present capitalization, dividend policy, corporate structure or business of the Company.

12. Source and Amount of Funds. The total amount of funds required by the Purchaser to purchase 25,100,000 Shares pursuant to the Offer and to pay related fees and expenses is estimated to be approximately $610 million. The Purchaser plans to obtain all of the funds required for the Offer through capital contributions or advances which will be made to the Purchaser by BNI.

BNI intends to obtain the required funds from general corporate funds, including cash and the proceeds of short-term investments and marketable securities, and from borrowings under one or more of three existing credit agreements (the "Facilities"). BNI has approximately $500 million available

from its general corporate funds and approximately $1 billion available for borrowings under the Facilities.

The lenders under the Facilities comprise 26 domestic and foreign lending institutions. Each borrowing by BNI under the Facilities (a "Borrowing") will be unsecured. Each Borrowing will bear interest at one of the three following annual rates, as selected by BNI at the time of making such Borrowing and from time to time thereafter: (i) a "Base Rate" equal to the base rate announced by a designated institution under the Facility utilized for the Borrowing, plus, after October 30, 1986, 1/4 of 1% per annum, (ii) for any one or more of several interest periods which may be selected by BNI from time to time, a "Eurodollar Rate" equal to the interbank Eurodollar offered rate (or average of such rates) for loans of like

amount and maturity, determined by a designated institution or group of reference institutions under such Facility or Facilities, plus 3/8 of 1% through October 30, 1986, or 5/8 of 1% thereafter, plus certain reserve and other costs, or (iii) in the case of any portion of the Borrowings which is under the Facility with domestic lending institutions, for any one or more of several interest periods which may be selected by BNI from time to time, a "Domestic Money Market Rate" equal to the average of the reserve-adjusted secondary market rates for certificates of deposit of the reference institutions under such Facility in like amount and maturity, plus 1/2 of 1% through October 30, 1986, or 3/4 of 1% thereafter. The commitment to provide funds under the Facilities terminates on October 31, 1986 (subject to earlier termination

in certain events), and the principal of all Borrowings outstanding on that termination date will be payable in eight installments, the first seven of which are each equal to 10% of the aggregate principal amount of Borrowings then outstanding and are payable semi-annually from April 30, 1987 through April 30, 1990, and the final installment of which is payable on October 31, 1990. BNI may prepay all or any portion of the Borrowings without penalty, subject to certain restrictions. The Facilities provide for the payment by BNI of a commitment fee on the amount of the unused portion of each lending institution's commitment at the rate of 1/4 of 1% per annum, and for the payment by BNI of certain cost increases certified by the relevant lending institution as having resulted from such institution agreeing to make

or maintain, or making or maintaining, Borrowings at the Eurodollar Rate or the Domestic Money Market Rate. The Facilities contain conditions, covenants, events of default and indemnities common in such agreements. The following are the foreign lending institutions and the principal amounts available from them under the Facilities: Barclays Bank International Limited, $50,000,000; and The Toronto-Dominion Bank, $75,000,000.

In connection with the Offer, BNI has obtained agreements by the requisite number of lending institutions under the Facilities which provide that if BNI and its subsidiaries make investments in certain types of companies (which would include the Company) which result in such a company's becoming a consolidated subsidiary of BNI in accordance with generally accepted accounting

principles, then BNI may elect that such company not be treated as a "subsidiary," "consolidated subsidiary" or "material subsidiary" for purposes of BNI's complying with, or determining BNI's compliance with, any of its covenants or agreements, or for purposes of any other provision contained in the Facilities, other than certain reporting requirements relating to all subsidiaries, certain provisions relating to agent lending institution dealings with any subsidiary, certain indemnities by BNI under the Facilities, and BNI's covenant to cause each subsidiary to pay such dividends as it may legally pay, to the extent necessary to provide BNI with funds to repay its obligations under the Facilities. Any such election would be effective for 30 months from December 20, 1982. BNI intends, if it holds a

majority of the outstanding Shares after the Offer, to make such an election with respect to the Company. BNI's right to make such an election, and any such election made by BNI, (i) with respect to any particular subsidiary, terminates immediately if BNI and its subsidiaries acquire ownership of 100% of the capital stock of such subsidiary, and (ii) terminates as to all subsidiaries as to which BNI has made such an election at any time that the aggregate amount of all investments by BNI in all such subsidiaries, together with the aggregate amount of all of the obligations of such subsidiaries guaranteed by BNI, exceeds $750 million. BNI has made no election with respect to any other subsidiary. It is anticipated that Borrowings incurred by BNI to finance the Offer will be repaid from internally generated

funds and through other sources, which may include the proceeds of long-term or short-term borrowings, or the sale of debt or equity securities. BNI does not believe that it will be necessary to require the Company to change its dividend policy in order to repay any such Borrowings.

13. Certain Legal Matters. Except as described below, based on its examination of publicly available information with respect to the Company, the Purchaser is not aware of any approval or other action by any federal, state or foreign governmental or administrative authority which would be required for the acquisition of Shares by the Purchaser as contemplated herein, or of any licenses or other regulatory permits which appear to be material to the business of the Company and which would be

adversely affected by the acquisition of Shares as contemplated herein. Should any such approval or other action be required, it is currently contemplated that such approval or action would be sought. There is no assurance that any such approval or other action, if needed, would be obtained or, if obtained would not be without substantial conditions, or that adverse consequences might not result to the business of the Company or that certain parts of the business of the Company might not have to be disposed of in the event that such approvals were not obtained or such other actions were not taken. The Purchaser's obligation under the Offer to accept for payment and pay for Shares is subject to certain conditions, including conditions relating to the legal matters discussed in this Section 13. See Section 15.

(a) Antitrust Considerations. Under the Hart-Scott Act and the rules that have been promulgated thereunder by the FTC, certain acquisition transactions may not be consummated unless the required information has been furnished to the Antitrust Division and the FTC, and the waiting period requirements have been satisfied. The purchase of Shares pursuant to the Offer is subject to such requirements. See Section 2.

Under the provisions of the Hart-Scott Act applicable to the purchase of Shares pursuant to the Offer, purchases cannot be made until the expiration of a 15-day waiting period after the date on which BNI furnishes the required information and documentary material to the Antitrust Division and the FTC with respect to the Offer, unless both the Antitrust Division and the FTC terminate

the waiting period prior thereto. BNI delivered a Notification and Report Form under the Hart-Scott Act prior to 5:00 P.M., Eastern Standard Time, on December 20, 1982 to both the FTC and the Antitrust Division, and, accordingly, BNI believes that the waiting period under the Hart-Scott Act applicable to the Offer will expire at 11:59 P.M., New York City Time, on Tuesday, January 4, 1983. However, because funding for certain federal agencies, including the FTC and the Department of Justice, lapsed, the Premerger Notification Office of the Bureau of Competition of the FTC advised BNI of its position that the waiting period under the Hart-Scott Act would not commence until the first business day after funding is restored. Prior to the expiration of the waiting period, the FTC or the Antitrust

Division may extend the waiting period by requesting additional information or documentary material relevant to the Offer from BNI. If such request is made, the waiting period will be extended for an additional period of ten days following the date of substantial compliance with such request. Only one extension of the waiting period is authorized by the rules promulgated under the Hart-Scott Act. Thereafter, such waiting period can be extended only by court order.

If the Purchaser's acquisition of Shares is delayed pursuant to a request by the Antitrust Division or the FTC for additional information or documentary material pursuant to the Hart-Scott Act, the Purchaser may, but need not, extend the Offer and, in any event, the purchase of and payment for Shares by the

Purchaser must be deferred as aforesaid. Any extension of the waiting period under the Hart-Scott Act or any resulting extension of the Offer will not give rise to any withdrawal rights not otherwise provided for by applicable law. See Sections 1 and 3.

The Antitrust Division and the FTC frequently scrutinize the legality under the antitrust laws of transactions such as the Purchaser's acquisition of Shares pursuant to the Offer. At any time before or after the consummation of any of such transactions, the Antitrust Division or the FTC could take such action under the antitrust laws as it deems necessary or desirable in the public interest, including seeking to enjoin the transaction or seeking the divestiture of the Shares so acquired or the divestiture of substantial assets of the Company or Parent.

It is not possible to predict whether a challenge to the Offer on antitrust grounds will be made or, if such challenge were made, what the result would be. The Purchaser believes that its acquisition of Shares pursuant to the Offer will not substantially lessen competition in any line of commerce and, accordingly, that any challenge on antitrust grounds should not prevent the consummation of the Offer.

(b) State Takeover Laws. Various states have adopted so-called takeover laws purporting to apply to offers to acquire shares of corporations which are incorporated or have substantial assets, stockholders, principal executive offices, employees and/or principal places of business therein. To the extent that any state takeover statute purports to apply to the Offer, the Purchaser

believes that such statute conflicts with federal law and constitutes an unreasonable burden on interstate commerce. In this regard on June 23, 1982, the Supreme Court of the United States in Edgar v. Mite Corp. held that the Illinois Business Takeover Act was unconstitutional. The Purchaser believes that the reasoning and holding in such decision applies to the state takeover laws referred to below.

The Purchaser has not complied with any state takeover laws. Based on publicly-available information with respect to the Company, the Purchaser believes that the state takeover statutes of Delaware, Louisiana, Oklahoma and Utah may purport to apply to the Offer. The Purchaser is commencing lawsuits in federal district courts in each of those states seeking a declaratory judgment

that the takeover law of such state is unconstitutional and seeking an injunction against its enforcement in connection with the Offer.

Based on publicly-available information regarding the Company, the Purchaser does not believe that the provisions of any other state takeover statutes purport to apply to the Offer. Should any person seek to apply any such law to the Offer, the Purchaser will take such action as then appears desirable, and currently expects that it will contest the validity of such statute in appropriate court proceedings.

In the event it is asserted that any state takeover statute is applicable to the Offer and a court of competent jurisdiction determines that such statute is valid as applied to the Offer, the Purchaser and BNI might be required

to file certain information with, or receive approvals from, the relevant state authorities, and the Purchaser might be unable to purchase or pay for Shares tendered pursuant to the Offer or be delayed in continuing or consummating the Offer. In such case, the Purchaser may not be obligated to accept Shares for payment. See Section 15.

(c) Federal Leases. According to the Company's 1981 10-K, the Company holds leases, or interests in leases, covering coal deposits in Utah and North Dakota. BNI believes that some or all of these leases may be located on federal lands subject to the Mineral Lands Leasing Act of 1920, as amended (the "Leasing Act"). Section 2(c) of the Leasing Act (30 U.S.C. §202) provides in part:

> No company or corporation operating a common-carrier railroad

> shall be given or hold a permit or lease under the provisions of this act for any coal deposits except for its own use for railroad purposes...

In addition, 30 U.S.C. §184(h) provides in part:

> If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, in violation of any provisions of this chapter, the lease may be cancelled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General...

On December 7, 1982, the Secretary of the Interior announced that the Department of the Interior will halt future leasing of federal coal deposits to energy firms which are corporate affiliates of common-carrier railroads. This announcement followed the issuance of a legal opinion by the Solicitor of the Department of the Interior recommending that, although the language of

Section 2(c) is ambiguous, and notwithstanding the Interior Department's previous interpretation of Section 2(c) as excluding corporate affiliates of common-carrier railroads from the scope of that Section's prohibition, the Interior Department should prospectively change its interpretation of Section 2(c) to include such corporate affiliates within the scope of the prohibition. The announcement stated that a reason for the change in interpretation was to achieve a unified Administration policy. (The Antitrust Division of the Department of Justice had expressed disagreement with the Interior Department's prior interpretation.) The release issued by the Secretary of the Interior also noted that both the Interior Department and the Antitrust Division of the Department of Justice have

for several years endorsed the repeal of Section 2(c) of the Leasing Act.

BNI believes that, if pursuant to the Offer or otherwise, the Company becomes a corporate affiliate of BNI for these purposes, the current Secretary of the Interior would not approve the grant of additional leases of coal deposits on federal land to the Company. Further, there can be no assurance that there will not be a challenge through court proceedings or otherwise to the legality of BNI's becoming an affiliate of the Company while the Company holds federal coal leases, or that BNI or the Company would prevail in the event of such a challenge.

BNI is advising the Interior Department and the Department of Justice of its view that Section 2(c) is inapplicable to the Offer and that if those

agencies disagree with this view, BNI will discuss with those agencies mechanisms to resolve their concerns, including hold separate arrangements to prevent corporate control by BNI over the Company's federal coal leases or possible divestiture under commercially reasonable conditions to qualified lessees. BNI cannot predit the outcome of any such discussions or whether a challenge would result in divestiture or forfeiture of the Company's existing leases of coal deposits on federal land. BNI is unable to estimate the value of these leases based on the information which is publicly available, although it would appear to BNI that such leases do not represent a material portion of the Company's overall business. The Company's 1981 10-K stated that there were no significant coal operations under way.

In addition, pursuant to the Leasing Act, subject to various exceptions, no corporation may hold or control oil and gas leases from the United States (or options therefor or interests therein) on more than 246,080 acres in the aggregate in any one state (other than Alaska, where the limit is higher), or coal leases on more than 46,080 acres in the aggregate in any one state and 100,000 acres in the aggregate in the entire United States. These laws further provide that the beneficial owner of more than 10% of the stock of a corporation is chargeable with a pro rata share of the acreage on which such corporation holds leases, options and interests.

Accordingly, if following the consummation of the Offer, BNI were to own beneficially more than 10% of the outstanding Shares, and if the combined

oil, gas and/or coal leases held by BNI and the Company (taking into account BNI's percentage ownership of the Company) were to exceed such maximum limitations, the aggregate holdings of BNI and the Company might have to be reduced or modified so as to avoid a forfeiture or divestiture of such leases or interests.

(d) United Kingdom. Publicly-available information indicates that one of the Company's subsidiaries is incorporated under the laws of England and is authorized by the United Kingdom Secretary of State for Trade to carry on in Great Britain specified classes of insurance business. The United Kingdom Insurance Companies Act of 1974 provides that no person shall become a "controller" (as defined below) of an insurance company authorized to carry on insurance business in Great Britain, unless such

person has served a notice giving prescribed particulars on the Secretary of State for Trade, and either the Secretary of State for Trade has indicated that he has no objection to such person's becoming a controller, or three months have elapsed without any such objection having been made. The Secretary of State for Trade may serve a notice of objection on such person if it appears to the Secretary that such person is not a fit and proper person to be a controller of the insurance company. The term "controller" as used in the Insurance Companies Act of 1974 would include BNI and the Chairman of the Board and President of BNI, both of whom have filed or will file the requisite notice with the Secretary of State for Trade.

14. Dividends and Distributions. If, on or after December 17, 1982, the

Company should split, combine or otherwise change the Shares or the capitalization of the Company, then, without prejudice to the Purchaser's rights under Section 15, the Purchaser, in its sole discretion, may make such adjustments in the purchase price and other terms of the Offer as it deems appropriate to reflect such split, combination or other change.

If, on or after December 17, 1982, the Company should declare any cash or stock dividend (other than regular quarterly cash dividends not in excess of $.37 per Share) or other distribution on, or issue any rights with respect to, the Shares payable or distributable to stockholders of record on a date prior to the transfer to the name of the Purchaser or its nominee or transferee on the Company's stock transfer records of the Shares purchased pursuant to the

Offer, then without prejudice to the Purchaser's rights under Section 15, (i) the purchase price per Share payable by the Purchaser pursuant to the Offer may be reduced by the amount of any such cash dividend or distribution and (ii) the whole or part of any such non-cash dividend, distribution or right to be received by the tendering stockholder will be required to be promptly remitted and transferred by each tendering stockholder to the Depositary for the account of the Purchaser, accompanied by appropriate documentation of transfer, and, pending such remittance or appropriate assurance thereof, the Purchaser will be entitled to all the rights and privileges as owner of any such non-cash dividend, distribution or right and may withhold the entire purchase price or deduct from the purchase price the

amount or value thereof, as determined by the Purchaser, in its sole discretion.

15. Certain Conditions of the Offer. Notwithstanding any other provision of the Offer, the Purchaser shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the Offer, or postpone the acceptance for payment or payment for Shares tendered, if, at any time on or after December 17, 1982 and prior to the acceptance for payment of any such Shares (whether or not any other Shares have theretofore been accepted for payment or paid for pursuant to the Offer), any of the following shall occur:

(a) there shall have been instituted or threatened or shall be pending any action or proceeding by or before any domestic or foreign

court or governmental, administrative or regulatory agency or authority (i) challenging the making of the Offer or the acquisition by BNI or the Purchaser of any Shares, directly or indirectly or otherwise directly or indirectly relating to the Offer, or (ii) otherwise affecting BNI or the Company or any of their respective subsidiaries or affiliates which, in the sole judgment of the Purchaser, is or may be adverse, or there shall be a subsequent development in any such action or proceeding which the Purchaser, in its sole judgment, considers to be adverse, to BNI, the Company or any of their respective subsidiaries or affiliates; or

(b) There shall have been any action taken, or any statute, rule,

regulation or order proposed, sought, promulgated, enacted, entered, enforced or deemed applicable to the Offer, by any state, federal or foreign government or any court, governmental, administrative or regulatory agency or authority, domestic or foreign, which may, in the sole judgment of the Purchaser, (i) result in a delay in or restrict the ability of BNI or the Purchaser to accept for payment or pay for some or all of the Shares which otherwise would be purchased or make the consummation of the Offer unduly burdensome to BNI or the Purchaser, (ii) render BNI or the Purchaser unable to accept for payment or pay for some or all of the Shares, (iii) make the acceptance for payment or payment for some or all of the

Shares illegal, (iv) require the divestiture by the Purchaser or any of its subsidiaries or affiliates of any Shares, or impose any limitation on any of them to own such Shares, (v) other than any hold separate arrangement or divestiture agreed to by BNI with respect to any federal coal leases, or interests therein, held by the Company referred to in Section 13 hereof, require the divestiture by BNI or any of its subsidiaries or affiliates of all or any portion of the business, assets or property of any of them, or of the Company or any of its subsidiaries or affiliates, or impose any limitation on any of them to conduct their respective businesses or own such assets or properties, (vi) impose material limitations on the ability

of the Purchaser or any of its subsidiaries or affiliates effectively to exercise full rights of ownership with respect to the Shares, including the right to vote the Shares purchased by it on all matters properly presented to the stockholders of the Company, or impose material limitations on the ability of BNI or any of its subsidiaries or affiliates effectively to control in any respect the business operations of the Company, BNI or any of their respective subsidiaries or affiliates, or (vii) otherwise adversely affect BNI, the Company or any of their respective subsidiaries or affiliates; or

(c) any change (or any development involving a prospective change) shall have occurred or been

threatened in the business, properties, assets, financial condition, operations, results of operations or prospects of the Company or any of its subsidiaries which, in the sole judgment of the Purchaser, is or may be materially adverse, or the Purchaser shall have become aware of any currently existing facts which, in the sole judgment of the Purchaser, have or may have material adverse significance with respect to the Company or the value of the Shares; or

(d) there shall have occurred (i) any general suspension of, or limitation on prices for or trading in, securities on the NYSE, (ii) a declaration of a banking moratorium by federal or state authorities or any suspension of payments in respect of banks or any limitation on

the extension of credit by lending institutions in the United States, (iii) a commencement of a war or armed hostilities or any other national or international calamity directly or indirectly involving the United States, (iv) a material change in the United States or any other currency exchange rates, or a suspension of, or limitation on, the markets therefor or (v) any limitation imposed by Federal, state or foreign authorities on the extension of credit by lending institutions which materially and adversely affects BNI or any of its subsidiaries or affiliates; or, in the case of any of the foregoing existing at the time of the commencement of the Offer, a material acceleration or worsening thereof; or

(e) the Company shall have (i) issued, sold, authorized or proposed the issuance of capital stock of any class (including Shares) or securities convertible into any such shares, or rights, warrants or options to acquire any such shares or other convertible securities, other than Shares issued upon the exercise, in accordance with the present terms thereof, of employee stock options outstanding on December 17, 1982, and Shares issued upon conversion of the Company's 13% convertible subordinated notes, (ii) issued, sold, authorized or proposed the issuance of, any other securities in respect of, or in lieu of, or in substitution for the Shares outstanding on December 17,

1982, (iii) purchased or otherwise acquired or proposed to purchase any outstanding Shares, (iv) declared or paid any dividend or distribution on the Shares (other than a quarterly cash dividend not in excess of $0.37 per Share at the normal time at which such dividends are declared and paid) or (v) authorized, recommended or proposed, or announced its intention to authorize, recommend or propose, any merger, consolidation, acquisition of assets, disposition of assets or any shares of capital stock, material change in its capitalization, sale of Shares by the Company's stockholders or any comparable event, not in the ordinary course of business, or taken any action to

implement any such transactions previously authorized, recommended, proposed or announced; or

(f) the Company or any of its affiliates shall have proposed or adopted any amendment to its Certificate of Incorporation or By-Laws; or

(g) a tender offer or exchange offer for some or all of the Shares is made, or publicly proposed to be made, or a merger or consolidation with, or acquisition of assets of, the Company is publicly proposed to be made by, another person, or the Purchaser shall have learned that (i) more than 5% of the outstanding Shares have been acquired, except for acquisitions for arbitrage purposes only, by another person or by a "group," as defined in Section

13(d)(3) of the Exchange Act or (ii) any new "group" is formed which beneficially owns more than 5% of the outstanding Shares; or

(h) BNI or any of its subsidiaries or affiliates shall have entered into a definitive agreement or announced an agreement or understanding for a merger or other business combination with the Company;

if, in the sole judgment of the Purchaser, in any such case, regardless of the circumstances (including any action or inaction by the Purchaser) giving rise to any such condition, such condition makes it inadvisable to proceed with the Offer and/or with such purchaser or payment.

The foregoing conditions are for the sole benefit of the Purchaser and may be asserted by the Purchaser

regardless of the circumstances giving rise to such condition or may be waived by the Purchaser in whole or in part at any time and from time to time in its sole discretion. Any determination by the Purchaser concerning the conditions described in this Section 15 shall be final and binding upon all parties.

16. Fees and Expenses. The Purchaser will not pay any fees or commissions to any broker, dealer or other person (other than the Dealer Manager as set forth below) for soliciting tenders of Shares pursuant to the Offer. Brokers, dealers, commercial banks and trust companies will be reimbursed by the Purchaser for customary mailing and handling expenses incurred by them in forwarding the Offer to Purchase and related materials to their customers.

Shearson/American Express Inc. has acted as financial advisor to the Purchaser and BNI and is acting as Dealer Manager in connection with the Offer. BNI has agreed to pay the Dealer Manager a fee of $350,000 upon commencement of the Offer and a fee of $0.12 per Share for each Share purchased pursuant to the Offer, provided that the aggregate fees payable to the Dealer Manager will not exceed $3 million. The Dealer Manager also will be reimbursed for its reasonable out-of-pocket expenses, including reasonable counsel fees. The Purchaser has agreed to indemnify the Dealer Manager against certain liabilities and expenses in connection with the Offer, including certain liabilities under the federal securities laws. BNI has unconditionally guaranteed the performance by the Purchaser of each of its obligations

to the Dealer Manager and the accuracy of the representations and warranties made by the Purchaser to the Dealer Manager.

D.F. King & Co., Inc. has been retained as Information Agent in connection with the Offer. The Information Agent may contact holders of Shares by Mail, telephone, telex, telegraph and personal interview and may request brokers, dealers and other nominee stockholders to forward materials relating to the Offer to beneficial owners. Customary compensation will be paid for such services in addition to reimbursement for reasonable out-of-pocket expenses and indemnification against certain liabilities in connection with the Offer.

The Depositary will receive reasonable and customary compensation for its

services in connection with the Offer, will be reimbursed for its reasonable out-of-pocket expenses and will be indemnified against certain liabilities in connection therewith.

17. Miscellaneous. The Offer is not being made to (nor will tenders be accepted from or on behalf of) holders of Shares residing in any jurisdiction in which the making or acceptance thereof would not be in compliance with the securities, "blue sky" or other laws or such jurisdiction. In any jurisdiction where securities, "blue sky" or other laws require the Offer to be made by a licensed broker or dealer, the Offer shall be deemed to be made on behalf of the Purchaser by one or more registered brokers or dealers licensed under the laws of that jurisdiction. No person has been authorized to give any

information or make any representation on behalf of the Purchaser not contained in the Offer and, if given or made, such information or representation may not be relied upon as having been authorized.

Pursuant to Rule 14d-3 of the General Rules and Regulations under the Exchange Act, a Schedule 14D-1 with respect to the Offer has been filed with the Commission by the Purchaser. That Schedule, which furnishes certain additional information, may be examined and copies may be obtained at the same places and in the same manner as set forth with respect to the information concerning the Company in Section 8 (except that it will not be available at the regional offices of the Commission).

R-H HOLDINGS CORPORATION

SCHEDULE A
DIRECTORS AND EXECUTIVE OFFICERS OF THE PURCHASER AND BNI

The name, business or residence address, present principal occupation or employment and material occupations, positions, offices or employments for the past five years (including name, principal business and address of any corporation in which such occupations or employments are or were carried on) of each director and executive officer of BNI and the Purchaser are set forth below. All of the executive officers and directors of BNI and of the Purchaser are citizens of the United States of America. The business address of each of the persons named below is 1111 Third Avenue, Seattle, Washington 98101, unless otherwise noted. Unless otherwise indicated, the person has been employed during the five-year period with the same organization in which he or she is presently employed.

BNI
Directors

Name, Business or Residence Address and Title	Present Principal Occupation or Employment and Material Occupations, Positions, Offices or Employment During the Past Five Years
ALWORTH, JR., ROYAL D., Director..... 1605 Alworth Building Duluth, Minnesota	Chairman of the Board of Oneida Realty Company, Duluth, Minnesota (realty); Director of McGraw Edison Company (lighting and electrical products) and Atlanta LaSalle Corporation (sporting goods).
BARNES, ZANE E., Director..... 112 North Fourth Street St. Louis, Missouri	President and Chief Executive Officer of Southwestern Bell Telephone Company, St. Louis, Missouri (telephone and communications services); Director of Alton Packaging Corporation, Reading & Bates Corporation (pipeline construction), Centerre Bancorporation, General American Life Insurance Company, INTERCO, Inc. (general retail merchandising and manufacturers of apparel, footwear and home furnishings) and Southwestern Bell Telephone Company.
BRESSLER, RICHARD M., Chairman of the Board, President and Chief Executive Officer of BNI.....	Chairman of the Board, President and Chief Executive Officer of BNI; held various positions with Atlantic Richfield Company from 1975 until 1980 (petroleum and natural gas); Director of First Bank System, Inc., Honeywell Inc. and Federated Department Stores; Trustee of Penn Mutual Life Insurance Company.
DAVISON, DANIEL P., Director..... 45 Wall Street New York, New York 10005	Chairman of the Board and President, United States Trust Company of New York, New York, New York (banking); held various positions with United States Trust Company since 1976; Director of Northwestern Portland Cement Co., Discount Corporation (underwriter, distributor and dealer in governmental securities) and The Atlantic Companies.

Name, Business or Residence Address and Title	Present Principal Occupation or Employment and Material Occupations, Positions, Offices or Employment During the Past Five Years
DEACY, JR., THOMAS E., Director..... 1102 Grand Avenue Kansas City, Missouri 64106	Attorney at Law, Partner, Deacy and Deacy, Kansas City, Missouri.
DREXEL, WALTER A., Director..... 176 East Fifth Street St. Paul, Minnesota 55101	President and Chief Operating Officer of Burlington Northern Railroad Company, St. Paul, Minnesota, a subsidiary of BNI; held various positions with Atlantic Richfield Company from 1975 to 1978; Vice President of Anaconda Copper Company from 1978 until 1981. Director of New Mexico and Arizona Land Company.
GARST, MARY, Director..... 218 South Fifth Street Coon Rapids, Iowa	Cattle Manager of The Garst Company, Coon Rapids, Iowa (farming and agricultural enterprises); Director of International Harvester Company (agricultural, industrial, construction equipment; trucks and recreational vehicles) and Northwestern Bell Telephone Company.
GRAYSON, RICHARD C., Director..... 176 East Fifth Street St. Paul, Minnesota 55101	Chairman of the Board and Chief Executive Officer of Transportation Group Burlington Northern Railroad Company, St. Paul, Minnesota, a subsidiary of BNI. Vice Chairman and President, Transportation Division, BNI from 1980 to 1981; Chairman of the Board and President of St. Louis-San Francisco Railway Company from 1973 until 1980. Director of Forth Worth and Denver Railway Company, a subsidiary of Burlington Northern Railroad, Centerre Bancorporation, Alton Packaging Corporation, Laclede Gas Company, New Mexico and Arizona Land Company and General American Life Insurance Company.

Name, Business or Residence Address and Title	Present Principal Occupation or Employment and Material Occupations, Positions, Offices or Employment During the Past Five Years
HAYFORD, WARREN J., Director..... 401 North Michigan Avenue Chicago, Illinois 60611	President and Chief Operating Officer of International Harvester Company, Chicago, Illinois (agricultural, industrial, construction equipment; trucks and agricultural vehicles) from 1979 until March 1982; President of Continental Can Company and Executive Vice President and Director of Continental Group from 1975 until 1979 (packaging products and machinery; financial services; insurance; transmission and distribution of natural gas); Director of Norton Company (industrial machinery).
HUTCHINSON, PEMBERTON, Director..... 2500 Fidelity Building Philadelphia, Pennsylvania 19109	President and Chief Operating Officer of Westmoreland Coal Company, Philadelphia, Pennsylvania (coal production and marketing); President of General Coal Company from 1975 until 1979; Director of Westmoreland Coal Company, Teleflex, Inc. (design, manufacture and marketing of mechanical and electromechanical control systems; hydraulic steering systems) and Girard Co. (one-bank holding company).
MENK, LOUIS W., Director.....	Chairman of the Board of Burlington Northern from 1978 until 1981; Chairman of the Board and Chief Executive Officer of Burlington Northern from 1971 to 1978; Director of ASARCO Incorporated (metals), Fort Worth and Denver Railway Company, a subsidiary of Burlington Northern Railroad, General Mills, Inc. (diversified consumer products), International Harvester Company (agricultural, industrial, construction equipment, trucks and recreational vehicles), and Stephens Inc.

Name, Business or Residence Address and Title	Present Principal Occupation or Employment and Material Occupations, Positions, Offices or Employment During the Past Five Years
O'LEARY, THOMAS H., Director, Vice Chairman of the Board.....	Vice Chairman of the Board of BNI; President and Director of Missouri Pacific Corporation, St. Louis, Missouri (railroad holding company), from 1974 until August 1982; Director of INTERCO, Inc., Mercantile Bancorporation, Inc. and Mercantile Trust Company.
PARKER, PAUL L., Director..... 9200 Wayzata Boulevard Minneapolis, Minnesota 55440	Executive Vice President and Chief Administrative Office of General Mills, Inc., Minneapolis, Minnesota (diversified consumer products company); Director of Equitable of Iowa.
ROCKWELL, BRUCE M., Director..... 17th and Champa Streets Denver, Colorado 80202	Chairman of the Board of Colorado National Bankshares, Inc. and Chairman of the Board, Colorado National Bank of Denver (bank holding company and banking); Director of Colorado National Bankshares, Inc.
RYAN, GERALD C., Director..... Highway 2 East Grand Forks, Minnesota	President of Ryan Potato Company, East Grand Forks, Minnesota; Director of First Bank System, Inc. and Terra Chemical International Inc.
STEIN, ELLIOT H., Director..... 515 Olive Street St. Louis, Missouri	President of Scherck, Stein & Franc, Inc., St. Louis, Missouri (investment brokers); Director of Angelica Corporation (institutional uniforms and career apparel; hospital textile rental), City Investing Company, General American Life Insurance Company, General Dynamics Corporation (diversified company with electronics, aerospace, marine and communications divisions), General Steel Industries, Inc., Home Group Inc. (insurance), Laclede Gas Company, New Mexico and Arizona Land Company, Ralston Purina Company (poultry and livestock feeds; pet foods), and West Indies Sugar Company.

Name, Business or Residence Address and Title	Present Principal Occupation or Employment and Material Occupations, Positions, Offices or Employment During The Past Five Years
WILLIAMS, JR., DAVID R., Director..... 6600 Yale Tulsa, Oklahoma	Chairman and President of The Resource Sciences Corporation, Tulsa, Oklahoma (engineering); Director of The Williams Companies (owner and operator of common carrier pipeline system; oil and gas production and exploration).

BNI

EXECUTIVE OFFICERS

Name, Present Position With BNI	Business Experience During Last 5 Years. Directorships in Public Corporations
*RICHARD M. BRESSLER, Chairman of the Board, President, Chief Executive Officer and Director	
*THOMAS H. O'LEARY, Vice Chairman of the Board	
JOHN C. ASHTON, Senior Vice President-Corporate Affairs.....	Vice President and Secretary, July, 1974 to March, 1981; Vice President Corporate Affairs, April, 1981 to May, 1981, and Senior Vice President Corporate Affairs, May, 1981 to date, BNI.
DON WOOD, Senior Vice President-Strategic Planning.....	Manager, Planning, June, 1977 to February, 1979; Manager, Planning and Evaluation, February, 1979 to October, 1980, Vice President, Planning and Control, February, 1980 to April, 1981, Anaconda Copper, a subsidiary of Atlantic Richfield Company; Senior Vice President, Strategic Planning, April 1981 to date, BNI.

*See information listed under Directors of BNI in this Schedule A.

Name, Present Position With BNI	Business Experience During Last 5 Years. Directorships in Public Corporations
FRANK S. FARRELL, Senior Vice President-Law and Secretary.....	Vice President-Law, August, 1974 to May, 1981; Senior Vice President-Law and Secretary, May 1981 to date, BNI.
JOHN B. PARRISH, Senior Vice President and Chief Financial Officer.....	Vice President of Finance, October 1976 to May 1979; Vice President and General Manager of Consumer Products Operations, May 1981 to July 1981, General Electric Do Brasil, Sao Paulo, Brazil (electrical manufacturing company); Vice President-Financial Services, July 1981 to May 1982, Vice President and Treasurer, May 1982 to November 1982, Senior Vice President and Chief Financial Officer, November 1982 to date, BNI.
DAVID F. YLKANEN, Senior Vice President-Human Resources.....	Director Organization and Manpower Planning prior to January, 1975; Director Personnel, May, 1975 to October, 1975; Assistant Vice President-Personnel, November, 1975 to January, 1977; Vice President-Personnel, January, 1977 to May, 1981; Senior Vice President Human Resources, May, 1981 to date, BNI.
FRANK BOYLE, Treasurer.....	Treasurer, June 1977 to October 1981, Vice President and Treasurer, October, 1981 to June 1982, United States Filter Corporation (diversified engineering, chemical, pollution control equipment and steam boiler manufacturer, now Ashland Technologies, a subsidiary of Ashland Oil); Deputy Treasurer June, 1982 to November, 1982, Treasurer, November, 1982 to date, BNI.
BRUCE L. ENNIS, President, Meridian Land & Mineral Company, a subsidiary of BNI.....	Law partner prior to January, 1975 to December, 1978. Moulton, Bellingham, Longo & Mather; President. December, 1978 to January, 1981, Montco; Vice President (coal and minerals), January, 1981 to June, 1981, BNI; President, June, 1981 to date, Meridian Land & Mineral Co., a subsidiary of BNI.

Name, Present Position With BNI	Business Experience During Last 5 Years. Directorships in Public Corporations
*RICHARD C. GRAYSON, President and Chief Executive Officer, Burlington Northern Railroad Company, a subsidiary of BNI.....	Project Manager June, 1976 to September, 1977, CONOCO, INC. Division Manager, September, 1977 to March 1981, CONOCO INC.; Vice President, April 1981 to May 1981, BNI; President, May 1981 to date, Milestone Petroleum Inc., a subsidiary of BNI.
JOHN F. GREENE, II, President, Milestone Petroleum Inc., a subsidiary of BNI.....	President and Chief Executive Officer, December 1973 to date, BN Transport Inc., a subsidiary of BNI.
CHARLES A. McGEE, President and Chief Executive Officer BN Transport Inc., a subsidiary of BNI....	Group Managing Partner prior to February 1976, Coopers & Lybrand; Consultant, February 1978 to September 1981, self-employed; Chairman, September 1982 to date Glacier Park Company, a subsidiary of BNI.
J.S. McMENAMIN, Chairman and Chief Executive Officer Glacier Park Company, a subsidiary of BNI.....	President prior to January 1977 to March 1981; Chairman of the Board, President, and Chief Executive Officer, March 1981 to date, Plum Creek Inc., a subsidiary of BNI.
FRED A. WINEGAR, Chairman of the Board, President and Chief Executive Officer Plum Creek Inc., a subsidiary of BNI.....	

*See information listed under Directors of BNI in this Schedule A.

THE PURCHASER

Directors and Executive Officers

Name	Title
*RICHARD M. BRESSLER....	Chairman, Chief Executive Officer and Director.
*THOMAS H. O'LEARY.....	Vice President, Secretary and Director.

*See information listed under Directors of BNI in this Schedule A.

Facsimile copies of the Letter of Transmittal will be accepted. The Letter of Transmittal and certificates for Shares should be sent by each stockholder of the Company or his broker, dealer, bank or trust company to the Depositary as follows:

THE DEPOSITARY IS:

FIDELITY UNION BANK

By Mail:	**By Hand:**
P.O. Box 1380 Newark, New Jersey 07101	Stock Tranfer Department 3rd Floor 10 Bank Street Newark, New Jersey

Any questions or requests for assistance should be directed to the Information Agent, the Dealer Manager or your broker, dealer, commercial bank or trust company.

THE INFORMATION AGENT IS:

D.F.KING & CO., INC.

One North LaSalle St.
Chicago, Illinois 60602
(312) 236-5881
(Call Collect)

60 Broad Street
New York, New York 10004
(212) 269-5550
(Call Collect)

400 Montgomery Street
San Francisco, California 94104
(415) 788-1119
(Call Collect)

THE DEALER MANAGER FOR THE OFFER IS:

SHEARSON/AMERICAN EXPRESS INC.

Two World Trade Center
One Hundred Fifth Floor
New York, New York 10048
(212) 321-6721
(Call Collect)

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14D-9
SOLICITATION/RECOMMENDATION STATEMENT
PURSUANT TO SECTION 14(d)(4)
OF THE SECURITIES EXCHANGE ACT OF 1934

THE EL PASO COMPANY
(Name of Subject Company)

THE EL PASO COMPANY
(Name of Person(s) Filing Statement)

Common Stock, Par Value $3.00 per Share
(Title of Class of Securities)

283362 10 1
(CUSIP Number of Class of Securities)

CARL M. JONES, ESQ.
Secretary
2727 Allen Parkway
The El Paso Company
Houston, Texas 77019
Telephone: (713) 525-9400

(Name, address and telephone number of person authorized to receive notice and communications on behalf of the person(s) filing statement)

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New York, NY 10171
Telephone (212) 371-9200

ARNOLD H. TRACY, ESQ.
Mudge, Rose, Guthrie & Alexander
20 Broad Street
New York, NY 10005
Telephone (212) 422-6767

Item 1. Security and Subject Company.

The title of the class of equity securities to which this Statement relates is Common Stock, par value $3.00 per share ("Shares") of the El Paso Company, a Delaware corporation (the "Company"). The address of the principal executive offices of the Company is 2727 Allen Parkway, Houston, Texas 77019.

Item 2. Tender Offer of the Bidder.

This Statement relates to the tender offer (the "Burlington Northern Offer") of R-H Holdings Corporation (the "Bidder"), a Delaware corporation and a wholly-owned subsidiary of Burlington Northern Inc. ("Burlington Northern"), a Delaware corporation, disclosed in a Tender Offer Statement on Schedule 14D-1 dated December 20, 1982 (the "Schedule 14D-1"), to purchase up to 25,100,000 Shares for cash at $24 net per Share.

The Schedule 14D-1 states that the principal executive offices of the Bidder and Burlington Northern are located at 1111 Third Avenue, Seattle, Washington 98101.

Item 3. Identity and Background

(a) The name and business address of the Company, which is the person filing this Statement, are set forth in Item 1 above.

(b) Certain contracts, agreements, arrangements or understandings between the Company and certain of its directors and executive officers are described on pages 8 through 15 of the Company's Proxy Statement dated March 12, 1982 (the "Proxy Statement") for its Annual Meeting of Stockholders held on April 27, 1982, which pages are filed herewith as Exhibit 1 and incorporated herein by reference.

Pursuant to an agreement dated as of July 7, 1978, between the Company and Howard Boyd, a director and formerly the Chairman of the Board of the Company, Mr. Boyd is obligated to render services to the Company as independent contractor until his death with respect to certain projects commenced during his tenure as an officer of the Company. In consideration for such services, the Company agreed to pay Mr. Boyd or his beneficiaries $60,000 per annum, adjusted for inflation, for so long as Mr. Boyd or his then present spouse shall live. A copy of such agreement is attached hereto as Exhibit 2 and incorporated herein by reference.

On December 23, 1982, the Board of Directors authorized the Company to enter into employment agreements with Richard S. Morris, Executive Vice

President and a director, and Michael B. Bracy, Senior Vice President, of the Company, which will provide for their continued employment with the Company in their current positions and at not less than their current salary levels for a period of five years. Such agreements shall provide that the employee shall remain entitled to benefits under such agreements if employment is terminated by him upon the occurrence of a significant change in his responsibilities or duties or a reduction in his total compensation or as a result of a change of control of the Company and a change in circumstances thereafter significantly affecting his position, he is unable to exercise the authorities or duties attached to his position.

On December 23, 1982, the Board of Directors also authorized an amendment

to the Company's Deferred Compensation Plan to provide that for the purposes of such Plan a participant shall be deemed to have retired at the instance of the Company if his duties as a director, officer or employee of the Company have been diminished or curtailed by the Company in any material respect.

Except as set forth in the preceding four paragraphs, to the best knowledge of the Company, there are no contracts, agreements, arrangements or understandings or any actual or potential conflicts of interest between the Company or its affiliates, and (i) the Company, its executive officers, directors or affiliates or (ii) the Bidder, Burlington Northern or their respective executive officers, directors or affiliates.

Item 4. The Solicitation or Recommendation.

(a) At a meeting held on December 23, 1982, the Board of Directors of the Company by a unanimous vote of all directors present determined that the Burlington Northern Offer is inadequate and not in the best interests of the Company or its stockholders. The Board of Directors strongly recommends that the Burlington Northern Offer be rejected by the Company's stockholders.

Because the Board believes that partial offers such as the Burlington Northern Offer are so inequitable to stockholders, it has authorized the payment to all stockholders of a dividend of one share of a new series of 8% cumulative convertible preferred stock for each 20 outstanding Shares. The preferred stock will have a stated value of

$25 per share. Each share of preferred stock will be immediately convertible into one Share, will have one vote and, except as indicated below, will vote as a single class with the Shares. The preferred stock will have a liquidation preference of $25 per share and will be redeemable at the Company's option after five years at $25 per share. In order to protect all stockholders against partial offers and particularly in this case against the anticipated failure by Burlington Northern to make a cash offer for all the outstanding Shares if it becomes a 25% holder of the Company's voting stock, any business combination between the Company and a 25% stockholder at a price below the highest price paid by the 25% stockholder for any of its Shares or in which consideration other than cash is paid will

require the approval of the holders of 90% of the outstanding preferred stock. The preceding requirements will be inapplicable in the event that the transaction being considered is approved by a majority of the directors of El Paso who were directors prior to the time that the holder acquired his 25% position (the "Continuing Directors"). If, within 10 days after becoming a 25% holder, the holder does not offer to acquire for cash the remaining Shares at a price at least equal to the highest price paid by it for any of its Shares, then the holders of the preferred stock, other than the 25% holder, will be entitled to elect one-third of the El Paso directors unless a majority of the Continuing Directors otherwise determines. The stock dividend will be payable on January 21, 1983 to record holders of Shares as of January 7, 1983.

A form of a letter to stockholders communicating the Board's recommendation and a press release relating to such recommendation are filed as Exhibits 3 and 4 hereto, respectively, and are incorporated herein by reference.

(b) In reaching its conclusions described in paragraph (a) above, the Board of Directors considered a number of factors, including the following:

(i) The Board's familiarity with the business of the Company and its prospects and financial condition.

(ii) A presentation by the Company's management which reviewed, among other things, the historical and current financial condition, results of operations, and prospects of the Company.

(iii) The advice of Merrill Lynch White Weld Capital Markets

Group ("Merrill Lynch") that the $24 per share to be paid pursuant to the Burlington Northern Offer is inadequate from a financial point of view. Merrill Lynch has acted as financial advisor to the Company for a considerable period of time and has been intimately involved in the Company's financial and strategic planning.

(iv) Current economic, monetary and market conditions.

(v) The fact that the Shares have traded in substantial volume significantly above $24 per share during the past year.

(vi) The following uncertainties, among others, relating to the Burlington Northern Offer:

- The Burlington Northern Offer is limited to 25,100,000 Shares, or

approximately 50.7% of the issued and outstanding Shares, and Burlington Northern has disclosed no definite plans to acquire the remaining equity interest in the Company. Although Burlington Northern intends to consider other transactions for obtaining some or all of the outstanding Shares, it stated that a decision to make such an acquisition would be conditioned upon a number of factors and that it has not presently determined at what time and on what terms such transactions would occur.

- Those stockholders whose Shares are not purchased pursuant to the Burlington Northern Offer, including stockholders whose Shares are subject to proration, might remain minority stockholders for an

indefinite period of time and the value of their investment in the Company could be adversely affected.

- By virtue of Burlington Northern's complex and restrictive financing arrangements for the Burlington Northern Offer, Burlington Northern may be forced to cause the Company to engage in transactions that would not be in the best interests of the remaining Company stockholders in order to carry its loans or in order substantially to increase its Investment above 51.8%.

(vii) The advice of the Company's legal counsel that the Burlington Northern offer raises serious legal questions under the federal securities laws as well as under other

federal and state laws. Counsel reviewed with the Board the desirability of resolving these questions by taking such action as deemed necessary and appropriate, including commencing litigation. Based upon that advice, the Board of Directors authorized the filing in appropriate jurisdictions of all necessary and appropriate complaints and requests for hearings under the federal securities laws and such other laws as the management of the Company, with the advice of counsel, determines are appropriate. The Board has instructed counsel to proceed promptly with these matters and to seek the earliest practicable resolution of such issues.

Item 5. Persons Retained, Employed or to be Compensated.

The Company has retained Merrill Lynch to act as its financial advisor in connection with the Burlington Northern Offer and other matters that may arise in connection therewith. For its services as financial advisor, Merrill Lynch will receive a fee of $250,000 (plus expenses including counsel fees) plus additional fees (a) equal to .3% of the aggregate value of certain sales of assets or subsidiary stock transactions, (b) equal to .3% of the aggregate consideration paid in certain purchases of Shares by third parties and in purchases of Shares by Burlington Northern at a price in excess of $24 per Share, (c) determined by negotiations between the Company and Merrill Lynch in the event that (i) neither Burlington Northern nor

any other party acquires more than 10% of the outstanding Shares, (ii) less than 25,100,000 Shares are acquired pursuant to the Burlington Northern offer at $24 per share or less, or (iii) some other form of transaction is entered into or (d) equal to $.05 per Share for each Share acquired by the Company. In addition, the Company has agreed to indemnify Merrill Lynch against certain liabilities arising out of its engagement. L. Emery Katzenbach, a director of the Company, is a Vice President of Merrill Lynch, Pierce, Fenner & Smith Incorporated of which Merrill Lynch is a division.

The Company has also retained Morrow & Co. and Hill and Knowlton, Inc. to render public relations advisory and other services to the Company. The Company will pay such firms reasonable

and customary charges for their services and will reimburse them for their reasonable expenses.

Neither the Company nor any person acting on its behalf currently intends to employ, retain or compensate any other person to make solicitations or recommendations to stockholders in connection with the Burlington Northern Offer.

Item 6. Recent Transactions and Intent with Respect to Securities.

(a) To the best of the Company's knowledge, no transactions in the Shares have been effected during the past 60 days by the Company or by any executive officer, director, affiliate or subsidiary of the Company, except as follows:

(i) On December 3, 1982, Travis H. Petty, Chairman of the Board, President and Chief Executive

Officer of the Company transferred 115 Shares as gifts to his children and grandchildren.

(ii) On December 13, 1982, Howard Boyd, a director of the Company, transferred 200 Shares as gifts to his children.

(iii) On November 18, 1982, the mother of David F. Mackie, Senior Vice President of the Company, sold 800 Shares in the open market at $17 3/8 per Share. According to information filed with the Securities and Exchange Commission, Mr. Mackie disclaims any beneficial interest in securities held by his mother.

(iv) During the past 60 days, the Trustees for Fund A of the Company's Employee Savings Plan and for the Company's Employees Stock

Ownership Plan purchased in the aggregate 368,716 shares for the benefit of the participants in such plans. All of the executive officers of the Company (including three directors who are also executive officers of the company) are participants in such plans. For further information with respect to such plans, see page 9 of the Proxy Statement.

(b) To the best of the Company's knowledge, none of its executive officers, directors, affiliates or subsidiaries presently intends to tender into the Burlington Northern Offer any Shares which are held of record or beneficially owned by such persons.

Item 7. Certain Negotiations and Transactions by the Subject Company.

(a) Except as indicted in paragraph (b) below, no negotiation is underway or

is being undertaken by the Company in response to the Burlington Northern Offer which relates to or would result in (1) an extraordinary transaction, such as a merger or reorganization, involving the Company or any of its subsidiaries; (2) a purchase, sale or transfer of a material amount of assets by the Company or any of its subsidiaries; (3) a tender offer for or other acquisition of securities by or of the Company; or (4) any material change in the present capitalization or dividend policy of the Company.

(b) At the meeting of the Board of Directors held on December 23, 1982, the Board considered and reviewed the desirability of exploring and investigating certain types of transactions, such as repurchases of Shares, the public or private sale of equity or

other securities of the Company, a business combination between the Company and another company, the acquisition of the entire Company or of one or more of its significant business segments by another company, a joint venture between the Company and one or more other companies, the acquisition by the Company of all or part of the business of another company, the disposition of a portion of the assets of the Company, a complete or partial liquidation of the Company or the declaration of an extraordinary dividend. After considerable discussion, the Board resolved that it was desirable and in the best interests of the Company and its stockholders to explore and investigate, with the assistance and advice of Merrill Lynch, transactions of such nature, although the Board noted that the initiation or continuation of

such activities may be dependent upon Burlington Northern's future actions with respect to the Burlington Northern Offer. There can be no assurance that these activities will result in any transaction being recommended to the Board of Directors or that any transaction which is recommended will be authorized or consummated. The effectuation of any transaction of the type referred to in this Item 7(b) may have an impact on the Burlington Northern offer.

At such meeting of the Board of Directors, the Board also adopted a resolution relating to the need for confidentiality with respect to the parties to, and possible terms of, any transactions or proposals of the type referred to above during the continuation of negotiations with respect to any such transaction.

Item 8. Additional Information to be Furnished.

At its December 23, 1982 meeting, the Board of Directors adopted an amendment to the Company's By-laws with respect to shareholder action by written consent. A copy of such amendment is filed herewith as Exhibit 5 and incorporated herein by reference.

Item 9. Material to be filed as Exhibits.

Exhibit 1 - Copy of pages 8-15 of the Proxy Statement.

Exhibit 2 - Agreement, dated as of July 7, 1978, between the Company and Howard Boyd.

Exhibit 3 - Form of letter dated December 23, 1982 being mailed to stockholders of the Company.

Exhibit 4 - Form of press release being issued by the Company on December 23, 1982.

Exhibit 5 - Amendment to the Company's By-laws adopted on December 23, 1982.

Exhibit 6 - Materials being sent to participants in the Company's Employee Savings and Employee Stock Ownership Plans.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this Statement is true, complete and correct.

Date: December 23, 1982

THE EL PASO COMPANY

By.....
Executive Vice President

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14D-9
SOLICITATION/RECOMMENDATION STATEMENT
PURSUANT TO SECTION 14(d) (4)
OF THE SECURITIES EXCHANGE ACT OF 1934
(Amendment No. 1)

THE EL PASO COMPANY
(Name of Subject Company)

THE EL PASO COMPANY
(Name of Person(s) Filing Statement)

Common Stock, Par Value $3.00 per Share
(Title of Class of Securities)

283362 10 1
(CUSIP Number of Class of Securities)

Carl M. Jones, Esq.
Secretary
The El Paso Company
2727 Allen Parkway
Houston, Texas 77019
Telephone: (713) 525-9400
(Name, address and telephone number of person authorized to receive notice and communications on behalf of the person(s) filing statement)

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Arnold H. Tracy, Esq.
Mudge, Rose, Guthrie & Alexander
20 Broad Street
New York, NY 10004
Telephone (212) 701-1000

This Amendment No. 1 amends and supplements the Solicitation/Recommendation Statement on Schedule 14D-9, dated December 23, 1982, filed by the El Paso Company, a Delaware corporation (the "Company"), in connection with the tender offer (the "Burlington Northern Offer") of R-H Holdings Corporation (the "Bidder"), a Delaware corporation and a wholly-owned subsidiary of Burlington Northern Inc. ("Burlington Northern"), a Delaware corporation, disclosed in a tender offer statement on Schedule 14D-1, dated December 20, 1982, to purchase up to 25,100,000 shares of Common Stock, par value $3.00 per share ("Shares"), of the Company.

Item 3. Identity and Background.

In addition to Messrs. Petty and Holik, the following executive officers of the Company were, at various times

during May and November, 1982, designated as participants in the Company's Deferred Compensation Plan: Richard S. Morris, Michael B. Bracy, Virgil R. Cowart, Thomas W. Curry, David F. Mackie, Edward G. Najaiko, Jack B. Owens, Billy B. Ross and John B. Megahan.

Item 4. The Solicitation or Recommendation.

The Company believes that the previously reported distribution to its stockholders of the cumulative convertible preferred stock will be tax free except to the extent that cash, if any, is received in lieu of fractional shares. Certain dispositions and redemptions of the preferred stock may be subject to special rules contained in Section 306 of the Internal Revenue Code of 1954, as amended (the "Code"). In addition, the preferred stock will be

subject to certain provisions contained in Section 305 of the Code. In connection with the distribution of the preferred stock, the Company will furnish stockholders with additional information concerning the federal income tax consequences of holding and disposing of the preferred stock.

Item 9. Material to be filled as Exhibits.

Exhibit 7 -- Resolutions, adopted December 23, 1982, amending the Company's Deferred Compensation Plan.

Exhibit 8 -- Resolutions, adopted December 23, 1982, amending the Trust Agreement relating to the Company's Employee Stock Ownership Plan.

Exhibit 9 -- Resolutions, adopted December 23, 1982, amending the Trust Agreement relating to the Company's Employee Savings Plan.

Exhibit 10 -- Press Release issued on December 23, 1982.

Exhibit 11 -- Complaint, filed on December 23, 1982, by the Company against Burlington Northern and the Bidder in the United States District Court for the Western District of Texas.

Exhibit 12 -- Employment Agreement, dated December 24, 1982, between the Company and Richard S. Morris.

Exhibit 13 -- Employment Agreement, dated December 24, 1982, between the Company and Michael B. Bracy.

Exhibit 14 -- Press Release issued on December 25, 1982.

Exhibit 15 -- Form of Certificate of Adoption with respect to the Preferred Stock.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this Statement is true, complete and correct.

Date: December 27, 1982

THE EL PASO COMPANY

By: /s/ R.S. Morris

Executive Vice President

THE WALL STREET JOURNAL

December 30, 1982

TWO EL PASO CO. AIDES GOT GOLDEN PARACHUTE' CONTRACTS LAST WEEK

Houston- El Paso Co. trying to fend off a hostile takeover by Burlington Northern Inc., has adopted an increasingly common tactic these days: handing its top executives so-called golden parachutes.

In a filing with the Securities and Exchange Commission, El Paso disclosed that it signed five-year contracts with two top executives that guarantee their current positions with El Paso at "not less that their current salary levels" for five years. The officers are executive vice president Richard S. Morris and senior vice president Michael B. Bracy.

According to the filing they would receive salary and benefits totaling about $465,000 annually after a change in control of the company, or if they determined that there was "a significant change" in their responsibilities or duties, a reduction in their total compensation or, for any other reason, they were "unable to exercise the authorities or duties" of their current posts. The golden parachutes would open even if the executives left the petroleum and chemicals holding company voluntarily.

El Paso's board authorized the contracts last Thursday, three days after Burlington Northern, a transportation and natural resources concern, its takeover attempt, the filing states.

A company spokesman said the executives needed the contracts to protect

them from an acquiring company's management changes because, unlike the other top officials at El Paso, the lack the years at the company needed to accumulate hefty retirement benefits. According to El Paso's March proxy materials, in 1981 Mr. Morris earned $269,674 in salary, fees and benefits while Mr. Bracy earned $195,455.

A golden parachute is a special employment agreement that in most cases, protects top executives with a lucrative severance package if control of the company changes. As a result of a flurry of mergers and acquisitions this year, about 30% of the nation's top companies have given golden parachute to top managers, according to recent studies.

Also last Thursday, El Paso's board changed a deferred compensation plan to

make about a dozen top executives covered by the plan eligible for additional retirement benefits if their responsibilities "have been diminished or curtailed." A company spokesman said he couldn't determine the amount of compensation provided under the change.

In a separate development, El Paso said their federal appeals court in Philadelphia will hear its appeal this morning of the denial of an extension of the Burlington Northern offer's proration period. A federal court in Delaware earlier this week ruled against El Paso's request for a 10-day extension of the period, which is scheduled to end at midnight.

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

SCHEDULE 14D-9
SOLICITATION/RECOMMENDATION STATEMENT
PURSUANT TO SECTION 14(d)(4)
OF THE SECURITIES EXCHANGE ACT OF 1934

THE EL PASO COMPANY
(Name of Subject Company)

THE EL PASO COMPANY
(Name of Person(s) Filing Statement)

Common Stock, Par Value $3.00 per Share
(Title of Class of Securities)

283362 10 1
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ITEM 1. Security and Subject Company.

The title of the class of equity securities to which this Statement relates is Common Stock, par value $3.00 per share ("Shares"), of The El Paso Company, a Delaware corporation (the "Company"). The address of the principal executive offices of the Company is 2727 Allen Parkway, Houston, Texas 77019.

ITEM 2. Tender Offer of the Bidder.

This Statement relates to the tender offer (the "Offer") of R-H Holdings Corporation (the "Bidder"), a Delaware corporation and a wholly-owned subsidiary of Burlington Northern Inc. ("Burlington Northern") a Delaware corporation, disclosed in a Tender Offer Statement on Schedule 14D-1 dated January 11, 1983 (the "Schedule 14D-1"), to purchase up to 21 million Shares for cash at $24

net per Share. The Schedule 14D-I states that the principal executive offices of the Bidder and Burlington Northern are located at 1111 Third Avenue, Seattle, Washington 98101.

ITEM 3. Identity and Background.

(a) The name and business address of the Company, which is the person filing this Statement, are set forth in Item 1 above.

(b) (1) Certain contracts, agreements, arrangements or understandings between the Company and certain of its directors and executive officers are described on pages 8 through 15 of the Company's Proxy Statement dated March 12, 1982 (the "Proxy Statement") for its Annual Meeting of Stockholders held on April 27, 1983, which pages are filed herewith as Exhibit 1 and incorporated herein by reference.

Pursuant to an agreement dated as of July 7, 1978, between the Company and Howard Boyd, a director and formerly the Chairman of the Board of the Company, Mr. Boyd is obligated to render services to the Company as an independent contractor until his death with respect to certain projects commenced during his tenure as an officer of the Company. In consideration for such services, the Company agreed to pay Mr. Boyd or his beneficiaries $60,000 per annum, adjusted for inflation, for so long as Mr. boyd or his then present spouse shall live. In addition, Howard Boyd has a deferred compensation agreement with the Company that provides for a monthly deferred compensation credit of $1,250, which began on May 1, 1969 and continued until the termination of his employment, plus 6 percent interest,

compounded monthly, on the unpaid balance of such credits. On June 1, 1979, Mr. Boyd retired as an executive of the Company and began receiving payments under both agreements. copies of the agreements with Mr. Boyd are filed herewith as Exhibit 2 and incorporated herein by reference.

On December 24, 1982, the Company entered into employment agreements with Richard S. Morris, Executive Vice President and a director, and Michael B. Bracy, Senior Vice President, providing for their continued employment with the Company in their current positions and at not less than their current salary levels for a period of five years. Such agreements provide that the employee shall remain entitled to benefits under such agreements if employment is terminated by him upon the occurrence of a

significant change in his responsibilities or duties or a reduction in his total compensation or as a result of a change of control of the Company and a change in circumstances thereafter significantly affecting his position, he is unable to exercise the authorities or duties attached to his position. Copies of such agreements are attached hereto as Exhibit 3 and are incorporated herein by reference.

On December 23, 1982, the Board of Directors amended the Company's Deferred Compensation Plan to provide that for the purposes of such Plan a participant shall be deemed to have retired at the instance of the Company if his duties as a director, officer or employee of the Company have be diminished or curtailed by the Company in any material respect. In addition to Mr. Petty, the following

executive officers of the Company were, at various times during May and November, 1982, designated as participants in the Company's Deferred Compensation Plan: Richard S. Morris, Michael B. Bracy, Virgil R. Cowart, Thomas W. Curry, William V. Holik, David F. Mackie, Edward G. Najaiko, Jack B. Owens, Billy B. Ross and John B. Megahan. Resolutions, adopted December 23, 1982, amending the Company's Deferred Compensation Plan, are attached hereto as Exhibit 4 and are incorporated herein by reference.

On January 7, 1983, the Company entered into employment agreements with David F. Mackie and Billy B. Ross, Senior Vice President and General Counsel and Senior Vice President and Controller of the Company respectively, which provide for their continued

employment with the Company in their current positions and at not less than their current salary levels for a period of three years. Copies of such agreements are attached hereto as Exhibit 5 and are incorporated herein by reference.

(2) On January 10, 1983 the Company, Burlington Northern and the Bidder entered into an agreement (the "Agreement") pursuant to which, among other things, (i) the Bidder terminated a tender offer for up to 25,100,000 Shares which it had commenced on December 21, 1982 (the "first Burlington Northern offer"), (ii) Burlington Northern has agreed to purchase, and the Company has agreed to sell, 4,166,667 Shares at $24 per Share, which represents an investment of $100 million in the Company, (iii) the Offer is being

made, (iv) certain arrangements were made concerning various procedural safeguards designed to protect the interests of the minority stockholders of the Company if a subsequent merger or similar transaction with Burlington Northern occurs, (v) the Company rescinded its December 23, 1982 authorization of a dividend of one share of $2.00 cumulative Convertible voting Preferred Stock, Series A for each 20 Shares, and an amendment to the Company's By-Laws relating to stockholder consents, (vi) all litigation between the parties relating to the first Burlington Northern offer was terminated, (vii) the number of directors constituting the Company's Board of Directors was increased to 14 and four designees of Burlington Northern -- Messrs. Richard M. Bressler, Thomas H. O'Leary, Richard C. Grayson

and John F. Greene -- were elected to the Company's Board of Directors; if and when Burlington Northern or the Bidder beneficially owns approximately 33% of the Shares, the Company's Board of Directors will be comprised of eight Burlington Northern representatives, Mr. Petty and four other directors to be designated by mutual agreement of Messrs. Bressler and Petty, and (viii) an option was granted by the Company to the Bidder to purchase, from time to time subject to certain conditions, up to 4,950,000 authorized but unissued Shares at $24 per Share. A copy of the Agreement and related Stock Purchase Agreement are attached hereto as Exhibit 6 and incorporated hereinby reference.

(3) Except as set forth above, to the best knowledge of the Company, there are no contracts, agreements, arrangements or understandings or any actual or

potential conflicts of interest between the Company or its affiliates, and (i) the Company, its executive officers, directors or affiliates or (ii) the Bidder, Burlington Northern or their respective executive officers, directors or affiliates.

ITEM 4. The Solicitation or Recommendation.

(a) At a meeting held on January 10, 1983, the Board of Directors of the Company approved the Agreement. The Board has concluded, under all the circumstances, given current market conditions and in view of the provisions of the Agreement, not to oppose the Offer. Stockholders who wish to receive $24 per Share for at least a portion of their Shares should tender to the Bidder. A copy of a press release and a

letter to stockholders concerning the Agreement and the Board's recommendation are attached hereto as Exhibits 7 and 8 and are incorporated herein by reference.

(b) In deciding to approve the Agreement the Board considered a number of factors, including, without limitation: (i) the experience, since the announcement of the first Burlington Northern offer, of management and the Company's financial advisor, in exploring and seeking to develop alternatives to the first Burlington Northern offer, including possible transactions involving the sale of the entire Company or certain of its assets and various expressions of interest previously received for third parties and (2) the following additional factors with respect to the Agreement: (i) the Offer

will permit all stockholder an ample opportunity to tender their Shares without the pressure of a short ten-day proration period, (ii) Burlington Northern's commitments with respect to the composition of the Company's Board of Directors and any subsequent merger proposal or similar transactions, and (iii) the significant capital infusion to be made by Burlington Northern which, in the Board's view, will substantially strengthen the Company's financial condition for the benefit of all stockholders.

ITEM 5. Persons Retained, Employed or to be Compensated.

On December 23, 1982, the Company entered into an agreement with Merrill Lynch White Weld Capital Markets Group ("Merrill Lynch") providing for the payment by the Company to Merrill Lynch

of compensation in connection with its services as financial advisor to the Company. A copy of the agreement is attached hereto as Exhibit 9. L. Emery Katzenbach, a director of the Company, is a Vice President of Merrill Lynch, Pierce, Fenner & Smith Incorporated of which Merrill Lynch is a division.

Neither the Company nor any person acting on its behalf currently intends to employ, retain or compensate any person to make solicitations or recommendations to stockholders in connection with the offer.

ITEM 6. Recent Transactions and Intent with Respect to Securities.

(a) To the best of the Company's knowledge, no transactions in the Shares have been effected during the past 60 days by the Company or by any executive officer, director, affiliate or subsidiary of the Company, except as follows:

(i) On December 3, 1982, Travis H. Petty, Chairman of the Board, President and Chief Executive Officer of the Company transferred 115 Shares as gifts to his children and grandchildren.

(ii) On December 13 and 16, 1982, Howard Boyd, a director of the Company, transferred 300 Shares as gifts to his children, and on December 22, 1982 he transferred 100 Shares as a gift to the John R. Hubbard Chair in British History at the University of Southern California.

(iii) On November 18, 1982, the mother of David F. Mackie, Senior Vice President of the Company, sold 800 Shares in the open market at $17 1/2 per Share. According to information filed with the Securities and Exchange Commissions, Mr. Mackie disclaims any beneficial interest in securities held by his mother.

(iv) During the past 60 days, the Trustees for Fund A of the Company's Employee Savings Plan and for the Company's Employees Stock Ownership Plan purchased in the aggregate 368,716 shares for the benefit of the participants in such plans. All of the executive officers of the Company (including three directors who are also executive officers of the Company) are participants in such plans. For further information with respect to such plans, see page 9 of the Proxy Statement.

(b) The Company understands that its directors currently expect to either sell or tender substantially all of their Shares in response to the Offer. Except as indicated in the preceding sentence, the Company has no knowledge whether its executive officers, affiliates or subsidiaries presently intend to

tender any shares in response to the Offer which are held of record of beneficially owned by such persons or entities.

ITEM 7. Negotiations and Transactions by the Subject Company.

(a) See Item 3(b).

(b) None.

ITEM 8. Additional Information to be furnished.

Not applicable.

ITEM 9. Material to be filed as Exhibits.

Exhibit 1 -- Copy of pages 8-15 of the Proxy Statement.

Exhibit 2 -- Agreements with Howard Boyd.

Exhibit 3 -- Employment Agreements with Messrs. Morris and Bracy.

Exhibit 4 -- Resolutions adopted December 23, 1982, amending the Company's Deferred Compensation Plan.

Exhibit 5 -- Employment Agreement with Messrs. Mackie and Ross.

Exhibit 6 -- The Agreement and the Stock Purchase Agreement.

Exhibit 7 -- Form of press release issued by the Company and Burlington Northern on January 10, 1983.

Exhibit 8 -- Form of letter dated January 11, 1983, being mailed to stockholders of the Company.

Exhibit 9 -- Agreement with Merrill Lynch White Weld Capital Markets Group dated December 23, 1982.

SIGNATURE

After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this Statement is true, complete and correct.

Date: January 12, 1983

THE EL PASO COMPANY

By.....

Executive Vice President

FILED
NOV 14 1984
ALEXANDER L. STEVAS,
CLERK

(5)

No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

— against —

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does Section 14(e) of the Williams Act prohibit manipulative acts, even though the manipulator discloses those acts after they occur, at a time when it is too late to have the market freely react and for the victims of the wrongful acts to take corrective market action?

2. Did a manipulative act occur when the maker of a tender offer (i) for the sole purpose of protecting the target company insiders at the expense of tendering shareholders, wrongfully withdrew that offer, which had been opposed by the insiders, after it had been fully subscribed for, pursuant to an agreement between the maker and the target company insiders and (ii) immediately thereafter make a substituted tender offer on the same terms and conditions as the previous offer, allowing those insiders to tender their own target company shares while those who previously tendered all their shares would

now have those shares significantly reduced under the new offer?

3. Whether the remedies of those who tendered and were injured can be left to conflicting and inconsistent remedies of various states and whether any such remedy is not precluded?

THE PARTIES

The parties before this Court are those set forth in the caption.

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No. 83-2129

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

BARBARA R. SCHREIBER,

Petitioner

- against -

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of Delaware, dismissing the complaint pursuant to Rule

12(b)(6) F.R.C.P. and before discovery, is reported at 568 F.Supp. 197 and is set forth in the Joint Appendix ("JA") at JA-21 through JA-47. The opinion of a panel of the United States Court of Appeals for the Third Circuit, affirming the District Court is reported at 731 F.2d 163 and is set forth at JA-51 through JA-59.

JURISDICTION

On April 2, 1984, a panel of the Court of Appeals for the Third Circuit entered its decision, affirming the District Court's dismissal of the complaint. A timely petition for a Writ of Certiorari was filed on June 26, 1984. Certiorari was granted on October 1, 1984. Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution (U.S. Const. art. VI, cl.2):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which

> shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

The Commerce Clause of the United States Constitution (U.S. Const. art. I, §8, cl. 3):

> The Congress shall have Power...
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;...

* * *

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend. XIV) states, in pertinent part:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(e):

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which there are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

STATEMENT OF THE CASE

This action arises out of a tender offer, its wrongful termination after it was fully subscribed, and the substitution of a revised tender offer under terms and conditions favoring target company management and the tender offeror at the expense of target shareholders who tendered their shares in the initial tender offer.**

Petitioner in this action is Barbara R. Schreiber, suing on behalf of herself and all other similarly situated shareholders of respondent, The El Paso Company ("El Paso"), who tendered their shares to respondents Burlington Northern, Inc. ("Burlington") and R-H Holdings Corporation ("R-H"), pursuant to their

---

**Respondents never answered the complaint. Respondent's motion to dismiss under Rule 12(b)(6) F.R.C.P., therefore, assumed the truth of the substantive allegations of the complaint. Those allegations are the basis of the facts submitted herein and were the basis on which the Courts below acted (JA-24).

tender offer, dated December 21, 1982. The remaining respondents are the individual directors and officers of El Paso.

On December 21, 1982, respondent Burlington, through its wholly owned subsidiary, R-H, made a hostile tender offer ("December tender offer") for 25.1 million shares of El Paso stock at $24 per share, which if accepted, would have given Burlington/R-H majority control of El Paso (JA-10). The December tender offer had a deadline of December 30, 1982 and purported to permit the termination of the offer upon the occurrence of specified conditions which the complaint alleged were not applicable at bar (JA-11). On December 29, 1982, petitioner tendered her El Paso shares in response to the December tender offer, and by the December 30, 1982 deadline, the tender offer was fully subscribed, and Burlington/R-H held majority control of El Paso (JA-10).

Up to this point, El Paso management had urged rejection of the December tender offer on the stated ground that the

amount offered was "inadequate". El Paso management also implemented a number of defensive measures in opposition to the December tender offer, including issuing shares of preferred stock, which led to litigation between Burlington and El Paso before the Chancery Court in Delaware (JA-11). Once the December 30, 1982 deadline had passed, and it became clear that Burlington had succeeded in the December tender offer and El Paso was going to lose the Delaware litigation, El Paso management then entered into private negotiations with Burlington/R-H (JA-11). As a direct result of these negotiations, which were not contemporaneously disclosed to El Paso shareholders, respondents caused the December tender offer to be terminated and a revised tender offer submitted to the El Paso shareholders (JA-12).

The revised tender offer ("January tender offer") was made effective immediately upon the cancellation of the fully subscribed December tender offer, and before any of the shareholders who ten-

dered in the December offer had their shares returned (JA-27).

The January tender offer differed from the December offer in a number of significant respects. In contrast to the December tender offer which sought a total of 25.1 million shares of El Paso stock from the public, the revised January offer sought only 21 million shares (JA-12). As part of the negotiations which led to the termination of the December tender offer, El Paso management agreed to sell some 4.16 million shares of authorized, but as yet unissued stock, to Burlington/R-H at $24 per share, which would permit Burlington to assume control of El Paso upon the purchase of only 21 million shares through the January tender offer (JA-12). In order to completely assure the success of Burlington/R-H in the January tender offer, El Paso management also granted Burlington/R-H an option to purchase an additional 4.95 million shares of El Paso stock at $24 per share (JA-13). In exchange for these agreements, Burlington/R-H agreed to terminate the fully subscribed December

tender offer and to make a revised tender offer to permit El Paso management to tender shares that had been withneld in the "hostile" December offer (JA-12). Burlington/R-H also agreed to ratify certain "Golden Parachute" contracts for El Paso management made during the pendency of the December offer (JA-13). Once these collusive agreements were in place, El Paso management then recommended approval of the January tender offer even though the January tender offer was made for the same "inadequate" price as the prior December tender offer.

The cancellation of the fully subscribed December tender offer and the immediate issuance of the revised January tender offer caused substantial damage to the class. The termination of the December tender offer, combined with the reduced number of shares sought in the revised offer, and the fact that El Paso management approved and participated in the revised offer caused the January tender offer to be greatly over-subscribed, subjecting all shares tendered to extensive

proration.** The termination of the December tender offer, the sale of stock and options and the issuance of the revised January offer was disclosed to the El Paso shareholders only as a fait accompli. The market price of El Paso stock having already reacted to and having been set by the December offer had insufficient opportunity to respond as a free market before the January offer impacted and expired. Indeed, as a result of the hastily resubmitted January offer, the sale of El Paso stock and the option to acquire more, no "white knight" could even contemplate offering a counter bid. As a result, the El Paso shareholders were deprived of their right to exercise any free and unrestricted choice in the tender of their shares.

Petitioners brought suit in Federal District Court alleging violations of

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**More than 40 million shares were tendered in the January tender offer. R-H accepted only 21 million shares for payment on February 8, 1983 (JA-27).

Section 14(e) of the Williams Act, 15 U.S.C. §78n(e) (1982) and pendent state law claims. The United States District Court for the District of Delaware dismissed the complaint pursuant to Rule 12(b)(6) F.R.C.P. and prior to discovery for failure to state a claim under Section 14(e) of the Williams Act (JA-21). The District Court held that deception is an essential element of any claim under Section 14(e) of the Williams Act, and since no deception was present, there could be no claim (JA-40). It did not consider any evidence of manipulation nor was petitioner afforded the opportunity to submit evidence on the issue of manipulation. Indeed, petitioner was not permitted any discovery.**

**Respondents improperly submitted to the District Court El Paso's filings under Schedule 14D-9 which contained their self-serving declarations of good faith. The Courts below did not consider this submission, and plaintiff had no opportunity to contest the claims. At best, the declarations raised nothing more than disputed fact issues.

A panel of the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court (JA-51). The Third Circuit, although troubled by the conduct alleged in the complaint, affirmed the District Court's holding that deception was an essential element of a claim under Section 14(e) of the Williams Act (JA-58).

SUMMARY OF ARGUMENT

The Williams Act was conceived by Congress to establish a delicate balance between target company management and the bidder for the protection of target company investors. Section 14(e) of the Williams Act mandates full disclosure and expressly proscribes "fraudulent, deceptive, or manipulative acts or practices" committed in connection with a tender offer. The plain language of Section 14(e) prohibits each type of unlawful act as a separate and distinct category of misconduct. Deception or nondisclosure is, therefore, not a required element to establish a claim for fraudulent or manipulative acts committed in connection

with a tender offer. Congressional intent and legislative history, as well as SEC practice, support this conclusion.

Respondents violated Section 14(e) of the Williams Act by terminating a fully subscribed tender offer and substituting an inferior offer for the personal profit of target company management and the bidder at the direct expense of target company investors. The sale of unissued target company stock and lock-up options to the favored bidder served to deter competitive offers and deprive target investors of a free market for their shares. Such deliberate misconduct, committed in connection with a tender offer, constitutes a fraudulent or manipulative act in violation of Section 14(e) even though disclosed.

The decision of the Courts below to dismiss the federal claims raised by the petitioner must be reversed because both Courts erroneously held that deception or nondisclosure is an essential element to any claim brought under Section 14(e). The decision of the Courts below must be reversed for the additional reason that

such a construction of the Williams Act impermissably relegates target investors to the inappropriate, inconsistent and Constitutionally defective remedies of the various states. State court adjudication of nationwide class action claims brought under the Williams Act is prohibited by the Supremacy Clause, the Commerce Clause and the Due Process Clause of the United States Constitution. In enacting Section 14(e), Congress sought to establish uniform and consistent standards for the resolution of tender offer disputes. To permit litigation of tender offer misconduct under the differing laws of each state would lead not only to inconsistent and uncertain results, but would also improperly burden interstate commerce by destroying the delicately balanced regulatory scheme established by Congress in the Williams Act.

Accordingly, it is respectfully submitted that the decisions of the Court below must be reversed and petitioner's complaint reinstated.

I.

ARGUMENT

MANIPULATIVE OR FRAUDULENT ACTS IN CONNECTION WITH A TENDER OFFER ARE ACTIONABLE UNDER SECTION 14(e) OF THE WILLIAMS ACT IN THE ABSENCE OF DECEPTION OR NONDISCLOSURE

A. The Plain Language Of The Statute Prohibits Manipulative Or Fraudulent Acts Without The Presence Of Deception Or Nondisclosure

The Court has repeatedly observed, "[t]he starting point in every case involving construction of a statute is the language itself." Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975), reh'g denied, 423 U.S. 884 (1975) (Powell, J. concurring). The Williams Act, of which Section 14(e) is a part, was enacted in 1968 as an amendment to the Securities Exchange Act of 1934 ("1934 Act"). Pub.L.No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§78m (d)-(e), 78n(d)-(f) (1983)).

Section 14(e) of the Williams Act, 15 U.S.C. §78n(e), expressly provides:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

It is evident from the plain language of the statute, that Section 14(e) of the Williams Act is composed of three separate and distinct statutory commands. The first part of Section 14(e) is clearly aimed at ensuring truthful disclosure through the prohibition of misrepresentations, omissions or misleading statements made in connection with a tender

offer. The second component of Section 14(e) is clearly aimed at separate substantive conduct. It specifically prohibits "fraudulent, deceptive, or manipulative acts or practices" committed in connection with a tender offer.

The third component, added as an amendment to the Williams Act in 1970, Pub. L.No. 91-567, §5, 84 Stat. 1497 (1970) (codified as amended at 15 U.S.C. §78n (e)(1983)), specifically empowers the Securities and Exchange Commission ("SEC") to define and prescribe means to prevent fraudulent, deceptive, or manipulative acts in connection with a tender offer. The inclusion of the second and third parts of Section 14(e) clearly indicates Congressional intent that the Williams Act function as more than a disclosure provision.

The prohibition, in the second subparagraph of Section 14(e), clearly applies to three separate categories of conduct. The use of the word "any" to refer to fraudulent, deceptive, or manipulative acts indicates that Congress intended to prohibit all three categories

of misconduct, whether or not all three, only two or a single element was present in any particular case. The use of the disjunctive "or" to separate the terms "fraudulent, deceptive" from "manipulative" underscores this conclusion. If Congress had truly intended the prohibition of manipulative acts to require elements of deception, the use of the conjunctive "and" would have been far more appropriate.

This Court has consistently adhered to the view that Courts are "...obliged to give effect, if possible, to every word that Congress used... Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings..." Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) (citations omitted) (emphasis added).

In the context of the Williams Act, the use of the disjunctive "or" evidences Congressional intent that each subsection of the second part of Section 14(e) "proscribes a distinct category of misconduct." United States v. Naftalin, 441 U.S. 768, 774 (1979). If Congress had

intended deception to be a required element under all three parts, there could be no rational explanation for the use of the disjunctive "or" as opposed to "and" to separate fraudulent or deceptive acts from those which are only manipulative. The fact that Congress employed the same disjunctive "or" to separate manipulative acts from fraudulent or deceptive conduct in the third part of Section 14(e), lends further support to the view that Congress expressly intended to prohibit manipulative acts as a distinct category of misconduct separate from both fraudulent or deceptive acts.

This Court has always recognized that the plain language of the statute is to be obeyed and deferred to as opposed to some perceived intent or gloss based upon a belief as to Congressional desires. Thus, in Ernst & Ernst v. Hochfelder, the Court stated:

> To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another....After all, legislation when not ex-

> pressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

425 U.S. 185, 199 n.19 (1976), reh'g denied, 425 U.S. 986 (1976) (citations omitted). Accord, Jefferson County Pharm. Assn. v. Abbott Labs., 460 U.S. 150, 157 (1983); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

The term "manipulative" is not defined in the Williams Act. Moreover, there is no clear evidence regarding the Congressional definition of manipulation in the William Act. In the absence of any proof that Congress specifically intended to limit the term "manipulative" in the Williams Act to conform to a particular technical meaning, it must be presumed that Congress intended the term to be applied consistent with its standard or ordinary meaning. Indeed, as the Court held in another context: "No doubt Congress meant to prohibit the full range of ingenious devices that might be used

to manipulate securities prices." Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 477 (1977).

Congressional concern over manipulation is reflected throughout the legislative history to the Securities Exchange Act of 1934. In its outline of the 1934 Act, the House Committee on Interstate and Foreign Commerce stated:

> The chief provisions of the bill may be grouped under six headings: (a) control of credits; (b) control of manipulative practices; (c) provision of adequate and honest reports to securities holders by registered corporations; (d) control of unfair practices of corporate insiders; and (e) control of exchanges and over-the-counter markets; (f) administration.

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 7 (1934) (emphasis added). It is clear, therefore, that the 1934 Act is directed at a much wider purpose than mere disclosure. The House Report discussing the bill referred to the multitude of abuses which the bill was intended to cure. The general purpose of the 1934 Act, according to the House Report, was to condemn the "...unnecessary, unwise, and

destructive speculation" which threatened the essential elements of our economic system. H.R. Report No. 1383, supra, at 2-3. If, indeed, there is any single overriding purpose evident from the legislative history of the Securities Exchange Act of 1934, it is the protection of the public investor. As President Roosevelt wrote to Congress during consideration of the 1934 Act:

> I therefore recommend to the Congress the enactment of legislation providing for the regulation by the Federal Government of the operations of exchanges dealing in securities and commodities for the protection of investors, for the safeguarding of values, and, so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation.

Letter of President Franklin D. Roosevelt (Feb. 9, 1934), reprinted in H.R. Rep. No. 1383, supra, at 2 (emphasis added).

According to the standard dictionary definition of "manipulation", this term refers generally to the "use of unfair, scheming or underhanded methods especially for one's own advantage". Webs-

ter's Third New International Dictionary 1376 (1971). In the context of the securities markets, the term "manipulation" has been customarily used to refer to substantive conduct which artificially affects the market for or price of a security. See Harris v. United States, 48 F.2d 771, 774 (9th Cir. 1931); United States v. Brown, 79 F.2d 321, 325 (2d Cir. 1935); Crane Co. v. Westinghouse Air Brake Co., 419 F.2d 787, 795 (2d Cir. 1969) cert. denied, 400 U.S. 822 (1970). Classic examples of market manipulation include stock pools, wash sales and matched orders. 3 L.Loss, Securities Regulation 1529-73 (2d Ed. 1961). These practices are considered unlawful manipulative acts because they artificially affect the market for, or price of, securities through means unrelated to the natural forces of supply and demand. Note, Target Defensive Tactics As Manipulative Under Section 14(e), 84 Colum.L.Rev. 228, 238 (1984) (hereinafter cited as "Target Defensive Tactics"). Indeed, at common law, courts prohibited schemes that interfered with the free

market mechanism. Hundahl v. United Benefit Life Ins. Co., 465 F.Supp. 1349, 1360 (N.D.Tex. 1979). Since it is "the essence of the economic function of a securities exchange that it be a free market", manipulative acts must be prohibited. 3 L. Loss, supra, at 1531. Public investors are entitled to a "natural market" that is free from tampering, and such unlawful, manipulative acts do not always involve nondisclosure or deception**. Note, Manipulation of the Stock Markets Under the Securities Laws, 99 U.Pa.L.Rev. 651, 652-53 (1951); Junewicz, The Appropriate Limits of Section 14(e) Of The Securities Exchange Act of 1934, 62 Tex.L.Rev. 1171, 1186 (1984) (hereinafter cited as "Junewicz").

Section 14(e) also prohibits another category of wrong: fraudulent acts. Here, too, Congress did not provide any specific definition of the term "fraudulent". The inclusion of language to specifically proscribe fraudulent or manipulative acts indicates that Congress did not intend deception to be the sole test under Section 14(e). We shall show below that the bar against fraudulent or manipulative acts does not require the element of deception.

**Professor Loss noted the 1934 Act did not modify the common law concept of manipulation, but incorporated it. Id. at 1541.

We submit that the decisions below, in requiring deception, ignored the plain language of Section 14(e).

B. To The Extent That Congressional Intent Has Been Evidenced, This Intent Supports The View That Manipulative And Fraudulent Acts Are Separate Wrongs That Do Not Require Deception Or Nondisclosure And This Construction Is In Accord With Securities Exchange Commission Practice And Applicable Authorities

This Court has already concluded that the purpose of the Williams Act was to protect public investors and to avoid favoring either management or the takeover bidder. See, Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 29 (1977) reh'g denied, 430 U.S. 976 (1977); Edgar v. MITE Corp., 457 U.S. 624, 633-34 (1982). We submit that manipulative and

fraudulent acts are separate wrongs from that of deception, and the legislative history of Section 14(e) fully supports this conclusion.

While there are Congressional statements directed to the disclosure aspects of the Williams Act,** Congress was aware that contested tender offers take place in the context of severe pressure and extreme tactics designed to force stockholders of the target company to make a decision. The inclusion of specific language to prohibit fraudulent, deceptive, or manipulative acts as separate from the disclosure requirements of Section 14(e) indicates that Congress recognized disclosure alone would not provide

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**The Williams Act was originally introduced as a measure to protect against corporate raiders who were able to gain control of target companies in complete secrecy. 111 Cong.Rec. 28,257-60 (1965). As the legislation evolved, however, Congress not only mandated full disclosure, but also specifically prohibited acts or practices by any party to avoid "tipping the scales" in favor of either target management or the bidder. 113 Cong.Rec. 24,662-66 (1967).

sufficient protection for public investors in the tender offer context.

Apart from the language of the statute as originally enacted, it is significant to note that in 1970, Congress added the last phrase: "The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." Pub.L.No. 91567, §5, 84 Stat. 1497 (1970) (codified as amended at 15 U.S.C. §78n(e) (1982)). Thus, Congress reiterated its view that both fraudulent and manipulative acts were to be treated as conceptually distinct from deception. Indeed, granting the SEC rule-making power to prevent "fraudulent, deceptive, or manipulative" acts or practices is a strange way to deal with disclosure only. A more direct method for investing SEC with rule-making power over deception, as one commentator noted, would have provided "The Commission may adopt rules to ensure that full and fair disclosure is made to shareholders faced

with a tender offer." Junewicz, supra, at 1175.

Moreover, if Congress intended to limit the Williams Act solely to disclosure questions, it need not have amended the Act in 1970 to provide the last sentence. Section 14(d)(4) of the 1934 Act, originally enacted as part of the Williams Act, Pub.L. 90-439, §3, 82 Stat. 454 (1968), empowered the SEC to regulate the conduct of tender offer participants. This power included the regulation of disclosures made by all who solicit acceptances or rejections of tender offers. 15 U.S.C. §78n(d)(4)(1983). See, Canadian Pacific Enter., Inc. v. Krouse, 506 F.Supp. 1192, 1199 (S.D. Ohio 1981); Note, Defensive Tactics Employed By Incumbent Managements In Contesting Tender Offers, 21 Stan. L. Rev. 1104, 1114, n.54 (1969). Under this section, the SEC has adopted detailed rules and schedules governing disclosure in tender offers. See, e.g., Rule 14(d)-4 (codified at 17 C.F.R. §240.14d-4) (1984); Schedule 14D-9 (codified at 17 C.F.R. §240.14d-101) (1984). These schedules require complete

disclosure of "...material information, if any, as may be necessary to make the required statements ... not materially misleading...". See Schedule 14D-1, Item 10(f), codified at 17 C.F.R. §240.14d-100 (1984). Under Schedule 14D-9, these disclosures require, inter alia, the inclusion of management's reasons for its position on the tender offer and any arrangements or understandings between target management and the tender offeror. Hence, Section 14(e)'s rule-making authority was not crucial to the SEC's power to regulate disclosure in view of Section 14(d)(4).

Of equal importance is the fact that at the time of the enactment of the Williams Act in 1968 and its amendment in 1970, there was no doubt whatsoever that Section 10(b) and Rule 10(b)-5 applied to tender offer disclosures.** See, 5B A.

**Although this Court subsequently restricted the scope of Section 10(b) and Rule 10(b)-5 to purchasers and sellers in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), that decision was not yet before the Congress at the time of the enactment of the Williams Act.

Jacobs Litigation and Practice Under Rule 10(b)-5, Sections 185-193.18(f) (rev. ed. 1984). In fact, Section 10(b) was regularly applied to tender offers prior to the adoption of Section 14(e), and no Court ever held that it was inapplicable. See, e.g., SEC v. National Securities Inc., 393 U.S. 453, 468 (1969) (both Section 10(b) and Section 14 regulate fraudulent practices).

Significantly, at the time of the enactment of the Williams Act, Congress had before it the testimony of Honorable Manuel F. Cohen, then Chairman of the SEC, that the Commission should be provided with adequate tools "... to deal effectively with the various techniques ... to seek or to prevent takeover bids and ...adequate authority to ... give the investor the fairest possible opportunity to make his own investment decisions..." See Williams Act: Hearing On H.R. 14475 and S. 510 Before the Subcomm. On Commerce And Finance of the House Comm. on Interstate and Foreign Commerce, 90th Cong. 2d Sess. 11 (1968) Congress also had the report of the Senate Committee on

Banking and Currency that the purpose of the adoption of the rulemaking authority under Section 14(e) was "...to allow the Commission to deal more adequately with the sophisticated devices sometimes employed by both sides in contested tender offers..." S.Rep. 1125, 91st Cong., 2d Sess. 6 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 2233, 2238.

During the debates on the 1970 amendments, Congress also had before it the memorandum of the SEC (the Division of Corporation Finance) ennumerating some of the examples of fraudulent, deceptive or manipulative practices used in tender offers. Some of the examples cited did not relate to any element of deception. These included: (i) the bidder's failure to pay promptly for securities purchased or to return promptly securities not to be purchased; (ii) the bidder's failure to withdraw the bid or to make an appropriate announcement that the end of the proration period if the offer is fully subscribed; and (iii) trading on tender offer information by persons receiving the information from the bidder or target

company. See Additional Consumer Protection in Corporate Takeovers: Hearing on S. 3431 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 12 (1970).

Perhaps most importantly, Congress had the statements of the sponsor.** Senator Williams stated:

> The techniques used in corporate takeovers and tender offers have become increasingly sophisticated and change rapidly. This is particularly true in situations where the takeover is resisted by incumbent management -- industrial warfare develops. Claims and counterclaims, charges and counter-charges are hurled back and forth. Efforts are often made to influence the price of the securities involved. The Commission must be given full rulemaking powers in order to deal with these rapidly changing problems.

**This Court has long held that when statutory words are in doubt, the comments of the statute's sponsors are to be examined. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-5 (1951).

116 Cong.Rec. 3024 (1970) (emphasis added).

The fact that Congress intended to prohibit conduct not involving deception under Williams Act is made even more clear by the inclusion of the bar against fraudulent acts in Section 14(e). This inclusion is to be contrasted with the language of Section 10(b) (codified as amended at 15 U.S.C. §78j(b) (1983)), which only prohibits "any manipulative or deceptive device".** If Congress intended deception to be an essential element under Section 14(e), the word "fraudulent" is clearly inappropriate. The authorities have long recognized that conduct may be fraudulent even though it involves no deception, as in the case

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**Section 10(b) of the Securities Exchange Act of 1934 states that it is unlawful for any person to "use or employ in connection with the purchase or sale of any security...any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe..." 15 U.S.C. §78j(b) (1983).

where fiduciaries breach their fiduciary duty or there is other egregious conduct. See, e.g., SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 192-94 (1963); A.T. Brod & Co. v. Perlow, 375 F.2d 393, 397 (2d Cir. 1967); O'Neill v. Maytag Co., 339 F.2d 764, 769 (2d Cir. 1964); Norris & Hirshberg, Inc. v. SEC, 177 F.2d 228, 232 (D.C. Cir. 1949); Applied Digital Data Sys., Inc. v. Milgo Electronic Corp., 425 F.Supp. 1145, 1157-58 (S.D.N.Y. 1977) (issuing an injunction under §14(e) to stop Milgo's sale of shares for the "sole purpose" of defeating a tender offer); Royal Indus., Inc. v. Monogram Indus., Inc., [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶95,863, at 91,137-38 (C.D. Cal. Nov. 29, 1976); cf. Marshall Field & Co. v. Icahn, 537 F. Supp. 413, 422 (S.D.N.Y. 1982) ("[M]anagement [may act] in the best interest of its shareholders even if this will make more difficult the success of a disfavored offeror. The rule might be otherwise on a showing that management is acting for its own interests in violation of its fiduciary duty to its share-

holders."); Joseph E. Seagram & Sons, Inc. v. Abrams, 510 F.Supp. 860, 862 (S. D. N. Y. 1981) (temporary restraining order issued to prevent the directors of the target corporation from carrying out their plan to sell all corporate assets and even destroy its charter to thwart a takeover).

Fraudulent conduct has always been considered to include acts that do not involve misrepresentation or deception. This Court once held that fraud in equity "properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." Moore v. Crawford, 130 U.S. 122, 128 (1889). And when such conduct is intentional and enriches the fiduciary at the expense of the beneficary, it becomes fraudulent at law. See SEC v. Capital Gains Research Bureau, 375 U.S. 180, 192-4 & n.39 (1963); Supt. of Ins. v. Bankers Life & Casualty Co., 404 U.S. 6, 11, n.7 (1971); Allico Nat'l Corp. v.

Amalgamated Meat Cutters, 397 F.2d 727, 729-30 (7th Cir. 1968); O'Neill v. Maytag Co., 339 F.2d 764, 769 (2d Cir. 1964).

The mail fraud statute, 18 U.S.C. §1341 (1983) also provides analogous support. This statute, inter alia, outlaws the use of the mails to further "any scheme or artifice to defraud". Despite the view that criminal statutes are to be strictly construed, United States v. Culbert, 435 U.S. 371, 379 (1978), it is well-recognized that a knowing breach of fiduciary duty is fraudulent conduct barred by that statute. See, e.g., Post v. United States, 407 F.2d 319, 328-29 (D.C. Cir. 1968) cert. denied, 393 U.S. 1092 (1969). As at least one commentator has observed, case law under the mail fraud statute stands as persuasive authority that neither deception nor nondisclosure are required elements to establish fraud under Section 14(e). Junewicz, supra, at 1201-1205.

Thus, we submit that even if it could be assumed arguendo, that manipulation required deception, fraudulent acts clearly did not.

Finally, it is a well-settled principle of statutory construction that a Court should show "great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965) reh'g denied, 380 U.S. 989 (1965); SEC v. Talley Industries, Inc., 399 F.2d 396, 403 (2d Cir. 1968), cert. denied 393 U.S. 1015 (1968).

While the SEC has thus far not specifically defined the full scope of Section 14(e) manipulation, either by rule or administrative release, it has adopted a number of rules and regulations that are designed to expand the substantive protections afforded shareholders faced with a cash tender offer which are not keyed to deception. See, e.g., Regulation 14E (codified at 17 C.F.R. §240.14e-1 (1984)). Regulation 14(e), which was promulgated under the express authority of Section 14(e) prohibits certain tender offer practices which are made unlawful even in the absence of deception or nondisclosure. Rule 14e-1 (a) for example, declares it to be unlawful for a tender

offeror to hold any tender offer open for less than twenty (20) business days from the date of the first publication of the offer, while sub-part (c) of this Rule declares it to be unlawful for a tender offeror to fail to pay a consideration offered or to return the tendered securities "promptly after the termination or withdrawal of a tender offer". 17 C.F.R. §240.14e-1 (1984). Rule 14e-3 makes it unlawful for a person to trade on inside information knowingly received from a target company or a bidder. 17 C.F.R. §240.14e-3 (1984).

It is beyond dispute that the securities laws "constitute interrelated components of the federal regulatory scheme governing transactions in securities." Ernst & Ernst v. Hochfelder, 425 U.S. at 206. In order to preserve the integrity of this regulatory scheme, it is important that the Williams Act, like other securities legislation, be construed "not technically and restrictively, but flexibly to effectuate its remedial purposes." SEC v. Capital Gains Research Bureau, Inc., 375 U.S. at 195.

Several provisions of the Securities Exchange Act of 1934, in addition to Section 14(e), expressly prohibit manipulation. Section 10b, for example, declares it to be unlawful for any person to use or employ in the purchase or sale of a security "any manipulative or deceptive device or contrivance" which contravenes SEC rules and regulations. 48 Stat 891 (codified as amended at 15 U.S.C. §78j(b) (1982)). In construing Section 10b and Rule 10(b)-5, the Court, in Ernst & Ernst v. Hochfelder, and Santa Fe Industries, Inc. v. Green, looked to Section 9 of the 1934 Act which prohibits manipulation of security prices by the use of such practices as wash sales, matched orders and rigged prices. (425 U.S. at 205, n.25; 430 U.S. at 476; Section 9 of the 1934 Act) (codified at 15 U.S.C. §78i (1982). While parts of Section 9 relied upon by the Court do require nondisclosure, misrepresentation or deception as an element of the statutory violation, see, e.g., Sections 9(a)(1), (2) and (4) (codified at 15 U.S.C. §78i (a)(1), (2), and (4)) 1983)), it is equally clear that nondis-

closure is not an essential element under Sections 9(a)(3), (5) and (6). Indeed, as one commentator recently observed, public disclosure of a scheme to stablize the price of a security in violation of Section 9(a)(6) or a scheme to raise or depress the price of a security in violation of Section 9(a)(3) or (5) may serve to promote rather than curtail this type of unlawful manipulative conduct. Junewicz supra, at 1184-85 (1984).

Federal law also specifically prohibits manipulation in a number of contexts outside of the securities laws. The Commodity Exchange Act, codified at 7 U.S.C. §9 & 13(b) (1983), for example, prohibits market manipulation. Manipulation in that context has been defined as the creation of an artificial price by planned action. See Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), cert. denied, sub nom. Cargill, Inc. v. Butz, 406 U.S. 932 (1972); General Foods Corp. v. Brannan, 170 F.2d 220, 231 (7th Cir. 1948). In the antitrust context, the Court has defined unlawful market manipulation as the creation of an artificial

effect which prevents free market competition. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

There is no requirement in either of these contexts for the manipulation to be effected through deception or nondisclosure. As one Court stated, the test of manipulation must be a practical one because the "methods and techniques of manipulation are limited only by the ingenuity of man". Cargill, Inc. v. Hardin, 452 F.2d at 1163.

We submit that the common denominator connecting all improper practices under the term "unlawful manipulation" is the fact that all such unlawful acts involve the deliberate creation of an artificial market effect for the purpose of personal gain.

The commentators have recognized that unlawful manipulation under Section 14(e) does not require deception. See, e.g., Junewicz, supra, at 1174; Target Defensive Tactics, supra at 252; Weiss, Defensive Responses to Tender Offers And The Williams Act's Prohibition Against Manipulation, 35 Vanderbilt L.Rev. 1087, 1098

(1982); Note, Takeover Developments - Defining "Tender Offer" and "Manipulation" Under The Williams Act, 40 Wash. & Lee L.Rev. 1199, 1224 (1983); Note, Section 14(e) of The Williams Act: Can There Be Manipulation With Full Disclosure Or Was The Mobil Court Running On Empty, 12 Hofstra L.Rev. 159, 179 (1983); Note, Mobil Corp. v. Marathon Oil Co. - The Decision And Its Implications For Future Tender Offers, 7 Corp.L.Rev. 233, 250 (1984).

Section 14(e) of the Williams Act was enacted to protect the investor in the limited context of the cash tender offer by requiring disclosure of material information and also by expressly prohibiting fraudulent, deceptive, or manipulative acts which could "frustrate the exercise of an informed choice". Edgar v. MITE Corp., 457 U.S. 624, 634 (1982). It is clear that Congress intended Section 14(e) and the SEC to function as the guardians of free market competition in a tender offer context. While it is true that many acts of deception may be remedied by timely disclosure, to read into

the statute a requirement of deception or nondisclosure as an essential element of any manipulative or fraudulent act would defeat the very purpose of Section 14(e) by condoning manipulation of the tender offer process as long as the manipulation is disclosed. Such a reading of Section 14(e) ignores the plain language of the statute, its legislative history, administrative treatment and the underlying policies reflected in the Williams Act. Where disclosure of a manipulative act is made under conditions which deprive the investor of his right to exercise an informed choice, then disclosure cannot remedy the harm which Congress specifically addressed in its unqualified prohibition of manipulative acts. Indeed, one's awareness of being manipulated does not necessarily permit avoidance of the manipulative conduct. See, Note, Mobil Corp. v. Marathon Oil Co. -- The Decision And Its Implications For Future Tender Offers, 7 Corp. L.Rev. 233, 250 (1984).

Moreover, it is equally certain that the prohibition against fraudulent con-

duct is not remedied by subsequent disclosure.

The carefully reasoned authorities clearly support the foregoing conclusion. In Mobil Corp. v. Marathon Oil Company, 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982), Mobil had initiated a tender offer for control of Marathon, which Marathon directors sought to defeat. The target directors first endeavored to have the hostile bid enjoined on antitrust grounds to gain time until a more favorable bidder could be found. Marathon then granted U.S. Steel Corporation an irrevocable stock option for 10 million shares of Marathon stock and a conditional option to purchase the target's interest in the Yates Oil field which was exercisable only if another bidder won control of Marathon. Mobil brought suit to enjoin the grant of the options as a "manipulative act" in violation of Section 14(e). The District Court refused to enjoin the options, but the Sixth Circuit reversed and determined that the options were manipulative in violation of Section 14(e) even though

the options were disclosed. 669 F.2d at 376.

The Sixth Circuit concluded that the lockup options, taken either individually or together, were manipulative within the meaning of Section 14(e) because they "...not only artificially affect, but for all practical purposes completely block, normal healthy market activity and, in fact, could be construed as expressly designed solely for that purpose." Id. at 374. On the issue of disclosure, the Sixth Circuit determined that "to find compliance with Section 14(e) solely by disclosure of a manipulative device as a fait accompli would be to read the "manipulative acts and practices" language completely out of the Williams Act." Id. at 377. The Sixth Circuit concluded that Section 14(e) requires more than full disclosure, and thus, deception or nondisclosure is not an essential element to establish a manipulative act in violation of Section 14(e). Id. at 376-77. Accord, Pacific Realty Trust v. APC Investments, Inc., 685 F.2d 1083, 1086 (9th Cir. 1982).

Such a view, moreover, correctly reflects common law. At common law, schemes which interfered with the free market mechanism were barred as manipulative. See 3 L.Loss, supra, 1533-39, 1538-9.

The result of these authorities makes common sense. Tender offers are often made and contested in an atmosphere of extreme pressure. The shareholders of the target company are frequently forced to make choices concerning such offers in a limited time while being subjected to conflicting communications and surrounded by a barrage of litigation. The Williams Act is designed to protect such shareholders by giving them the opportunity to make a free and untrammeled choice through the requirement of their being given full and complete disclosure and the unhindered opportunity to make the decision whether to tender or not to tender, or to sell their shares in a freely functioning market. Neither the management of the target company nor the tender offeror are allowed to interfere with the choices available to the shareholder. Any activity which interferes with such

choice, whether through deception, or manipulation, or fraudulent acts, is prohibited. Clearly, where the alleged wrongful act is not deception, the Court must examine the facts to determine whether or not the act improperly interfered with the choices available to the target company shareholders, including the freely functioning marketplace.

A number of cases have declined to follow the Mobil analysis: Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 760 (2d Cir. 1983), cert. denied, 104 S.Ct. 550 (1983); Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 5 (2d Cir. 1983), cert. denied, 104 S.Ct. 1326 (1984); Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied 454 U.S. 1092 (1981); Dan River, Inc. v. Icahn, 701 F.2d 278, 288 (4th Cir. 1983); Feldbaum v. Avon Products, Inc., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,637, at 99,235 (8th Cir. August 24, 1984).

Many of these cases are factually distinguishable from the instant suit and

the comments of those Courts are dicta.** To the extent that these cases have all rested their comments on their perception of this Court's reasoning and holding in Ernst & Ernst v. Hochfelder, 425 U.S. 185, and Santa Fe Industries, Inc. v. Green, 430 U.S. 462, we submit they have misread those cases.

Both Ernst & Ernst and Santa Fe dealt only with the construction of Section 10(b) of the 1934 Act. Neither case purported to construe Section 14(e). As we have already noted at page 33, supra, the language of Section 10(b) is different than the language of Section 14(e). The legislative history of Section 14(e) clearly reflects an intention to encom-

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**Thus, Buffalo Forge involved a suit by a successful tender offeror to rescind a stock and option sale made by target management to a competing bidder; Panter involved only the withdrawal of a single tender offer and a claim for damages due solely to the "lost tender offer opportunity."; Dan River involved a suit by target management against the takeover group to prevent the exercise of voting rights to shares in the target.

pass and regulate behavior which goes beyond deception. The purpose of Section 10(b), on the other hand, is to encourage full disclosure in order to enable the trading process to proceed unhindered. Section 14(e) has purposes defined by the Court "to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." Edgar v. MITE Corp., 457 U.S. at 634.

In view of the differences in language and purpose between these two Sections, it is submitted that the Ernst and Santa Fe analysis is inapplicable to Section 14(e) cases, and reliance by the courts upon them in Section 14(e) issues is inappropriate.

We assume that respondents will contend in this Court, as they have contended in the Courts below, that our construction of Section 14(e) will cause the federal courts to intrude upon tender offer contests each time there is revision of a tender offer because there will

be an impact or effect upon the market price of the target company securities. Indeed, the District Court accepted that argument, holding "...potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated..." (JA-40).

The argument and the holding simply misconstrue the thrust of petitioner's complaint. It is not contended that a tender offer, even the one at issue, can never be revised or withdrawn once made. Nor does petitioner assert that every action which affects the marketplace is manipulative. What makes the facts of the instant action so egregious is that the cancellation and reissuance of Burlington's tender offer: (i) occurred after the offer had run its course, was fully subscribed, and had become legally binding; and (ii) served no purpose other than enabling El Paso's management and the bidder to protect themselves; (iii) at the expense and to the injury of El Paso's shareholders and investors.

There is no dispute that the cancellation and reissuance of the Burlington/R-H tender offer was intentional and manipulative. Indeed, the District Court found "it is true that defendants' activities with respect to the tender offer did influence the price of the stock" (JA-40). Although every investment decision impacts the market, that rationale cannot justify the decision below. What occurred was a deliberate manipulation or fraudulent act which resulted in an artificial impact on the market.

C. To Require Deception Or Nondisclosure As An Element Of Wrongful Conduct Is To Relegate Injured Parties Of Manipulative And Fraudulent Acts To Inappropriate, Inconsistent And Constitutionally Inadequate Remedies

To dismiss this action is to relegate petitioner and the other El Paso shareholders who tendered their shares in the December offer to multiple lawsuits in various states throughout the nation. Since the Burlington/R-H offer was made nationwide, it can be assumed that there were El Paso shareholders in most, if not

all, of the states. Each state could, theoretically, be the forum for litigation arising out of the misconduct of respondents. These lawsuits would involve not only laws of each state which might be in conflict, but the results of such parallel litigation could also lead to inconsistent and unfair results. Thus, one state could determine respondents' conduct was legal, while another state could decide the same conduct was illegal, and the measure of damages would almost certainly vary from state to state. Some states may have regulatory statutes purporting to regulate respondents' conduct which differ from every other state. Moreover, such multiple lawsuits would involve the parties in laborious, lengthy and uncertain litigation, which could impede and delay the ultimate conclusion of any tender offer.

To allow such inconsistent state action to overlap the tender offer area covered by the Williams Act, leads not only to extraordinary burdens upon interstate commerce in securities transactions related to tender offers, but

also interferes with the regulatory scheme encompassed by the Williams Act.

The purpose of the Williams Act was to ensure uniform treatment and a rapid resolution of all tender offer disputes. If this Court rejected the attempts by states to regulate tender offers, it must equally follow that any attempt by states to fashion remedies in the tender offer context, including damages, on an inconsistent and non-uniform basis must also be rejected. See Edgar v. MITE Corp., 457 U.S. 624; A.B.A Subcomm. on Proxy Solicitations and Tender Offers, Fed.Reg. of Sec. Comm., State Takeover Statutes and the Williams Act, reprinted in 32 Bus.L. 187 (1976); The Federalist No. 80, at 341 (A. Hamilton) (C. Beard ed. 1948); Gold, Clear Water, Federalism and the Res Judicata Impact Of State Judgments in Federal Environmental Litigation, 16 U.C.D. L. Rev. 1, 19 (1982); Sedler, Rules of Choice-of-Law Versus Choice-of-Law Rules: Judicial Method In Conflicts Torts Cases, 44 Tenn. L. Rev. 975, 1036 (1977).

Indeed, without federal control and uniform regulation of manipulative and fraudulent acts in the tender offer context, the free flow of market forces and the free market mechanism will be restricted and become ineffective. See Wilner & Landy, The Tender Trap: State Takeover Statutes And Their Constitutionality, 45 Fordham L. Rev.1 (1976). See Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 526 (1959); Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977) reh'g denied, 431 U.S. 925 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Edgar v. MITE Corp., 457 U.S. 624; Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317-18 (1981).

We assume that respondents will allude to the pendency of several lawsuits in the Delaware Chancery Court, purporting to sue respondents for breach of fiduciary duty and breach of contract. The existence of the state litigation is, if anything, illustrative of the above and further explains why the Williams Act must, in effect, preempt such state action

with respect to a tender offer. In the first place, it is significant to note that the case at bar was commenced prior to any Chancery Court litigation. The Chancery Court litigation in no way includes, nor could it encompass, any federal claims.

Secondly, while the Delaware Chancery Court lawsuits were brought as putative class actions, there are substantial questions concerning collusion between the litigants. Respondents and the plaintiffs in the state court litigation stipulated, ex parte, to class status, which, while approved by the Court, was made without notice to any member of the putative class and without affording any such member an opportunity to be heard respecting the adequacy of representation and whether such member wished to "opt out". In sum, the Delaware Chancery Court has constructed, on ex parte consent, a class consisting of thousands of tendering El Paso shareholders across the nation without notice and without an opportunity for any of the putative class members to opt out of the class or decide

whether they wish the particular plaintiff to be their representative. Nonetheless, it appears that Delaware will now assert jurisdiction and the result of any decision therein would be res judicata across the country.

Significantly, Delaware's sole contact with the dispute is that Burlington, R-H and El Paso were incorporated there and Delaware was the situs of litigation between Burlington and El Paso over the attempt by El Paso to issue shares of preferred stock in order to defeat the tender offer. However, the tender offer was made nationwide and was not limited to Delaware. Most of the tendering shareholders do not reside in the forum state. Indeed, probably very few members of the putative class have any contact with Delaware.

Such an attempt to assert jurisdiction and adjudicate a controversy involving thousands of non-Delaware residents with no significant contacts in Delaware violates the Fourteenth Amendment and the principles of jurisdiction ennunciated in International Shoe Co. v. Washington, 326

U.S. 310 (1945) and Shaffer v. Heitner, 433 U.S. 186 (1977). State court adjudication of the putative class action is constitutionally defective for the additional reason that no notice was provided to members of the class to permit them the opportunity to opt in or out and to determine whether the particular plaintiff will be an adequate representative. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950). The failure of the state court to observe even the most rudimentary constitutional safeguards requires that any judgment rendered in such litigation be denied any collateral effect. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974); Hansberry v. Lee, 311 U.S. 32, 45 (1940).

II

THE ACTS AT BAR VIOLATED SECTION 14(e) OF THE WILLIAMS ACT, EVEN THOUGH DISCLOSURE WAS MADE

The Courts below never considered whether or not the acts alleged in the complaint constituted manipulation. Peti-

tioner was never given any opportunity to conduct discovery or to submit evidence demonstrating that the acts alleged in the complaint were manipulative or fraudulent in violation of Section 14(e). The Courts below assumed that the acts constituted manipulation, but held that since the acts had been disclosed, there was no actionable wrong under Section 14(e). We have shown in Part I, supra, that the statute is otherwise. We shall demonstrate below that the allegations of the complaint set forth a valid claim for manipulative or fraudulent acts.**

**This Court has held that a complaint is sufficient to withstand a motion to dismiss for failure to state a claim if under any conceivable facts encompassed by the pleading, plaintiff can recover. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Collusive Agreement To Withdraw Fully Subscribed Tender Offer And Substitute Offer Detrimental To Target Company Shareholders Violates Section 14(e) Of The Williams Act, Even If Disclosed

The fundamental premise underlying the Williams Act and, indeed, all securities legislation, is that the maintenance of a free and competitive market is essential to the protection of the investor. Manipulation of the tender offer process is prohibited under the Williams Act because such acts are designed to stifle free market competition and "frustrate the exercise of an informed choice" by target investors. Edgar v. MITE Corp., 457 U.S. at 634 (1982). In the case at bar, the sale of target stock and lock-up options by the issuer was a manipulative or fraudulent act under Section 14(e) because these acts were intentional and deliberate, profited fiduciaries and others under obligation to El Paso shareholders and did, in fact, artificially limit free market competition for the shares of the target.

There are certain factors evident in this litigation which clearly demonstrate the wrongful nature of respondents' conduct. This action does not involve the mere revision or renegotiation of a pending tender offer, nor does it involve a claim of mere breach of fiduciary duty.

This is a case where the deadline for proration of the tender offer had passed, with the offer being fully subscribed. The tender offer had run its course, and Burlington had won. Notwithstanding the sporadic attempts by El Paso to continue litigation elsewhere, Burlington had made it clear that it proposed to proceed with the subscribed tender offer come what may. The market price of El Paso stock duly reflected that. No one else would tender for El Paso. Those who had subscribed had no other place to go. It was only then, after the tender offer had become a fait accompli that El Paso management entered into negotiations with Burlington. Thus, in effect, the El Paso management was playing a "heads I win, tails you lose" scheme attempted by the stock purchasers in A.T. Brod & Co. v.

Perlow, 375 F.2d 393, 395 (2d Cir. 1967).

El Paso rejected the December tender offer and resisted the takeover bid of Burlington. Obviously, if El Paso had succeeded in resisting the tender offer, no further negotiation would have ensued. But since they lost, El Paso management simply entered into an agreement with the bidder to manipulate the already fully subscribed tender offer to comport with their own personal interests. By so acting, they substituted their own self-serving agreement for the one chosen by target shareholders. Surely, the disclosure of El Paso's private agreement with Burlington after the fact cannot remedy the injuries suffered by the shareholders who had tendered their shares in the December tender offer. The disclosure provisions of the securities laws, which were meant to permit shareholders to make intelligent investment decisions, can be of no use when shareholders are faced with no alternative but to accede to management's will. The Sixth Circuit in Mobil Corporation v. Marathon Oil Co., observed the same discrepancy:

> It may be that the Marathon shareholders in this case have now been fully informed that their management granted USS the Yates Field option and the stock option. They may now understand fully how these options deter any tender offers higher than $125 per share. Yet, they have had no real alternative to accepting the USS offer, because Mobil's offer of $126 is conditional upon the invalidity of the options, and there is and could be no other comparable tender offer as long as the "lock-up options" remain in effect.

669 F.2d at 376-77 (emphasis added).

There is another reason that the decision of the Court below should not stand. In a "heads I win, tails you lose" scheme in which management can play both sides of the field, the carefully balanced scales between management of the target firm and the tender offeror designed for the protection of the shareholders and investors, become weighted in favor of management of the target firm. There is no longer any impetus for management to fairly evaluate any offer or to negotiate with a tender offeror, because

they can simply wait to find out whether the hostile tender offer will succeed. If it does not succeed, target management is spared from taking any action. If the hostile tender offer does succeed, as here, then after the fact, target management can approach the other corporation with terms more favorable to themselves and the tender offeror. This solution would have a particularly strong attraction to target management because cancellation of the original tender offer could be seen as "fit punishment" for those black sheep shareholders who went along with the hostile tender offer in the first place. Certainly it cannot be disputed that such a rule would deter investors from becoming involved in hostile tender offer bids because they are left with absolutely no protection from the manipulative machinations of target management and the tender offeror, even if the hostile tender offer succeeds.

This type of manipulative practice, in which "heads I win, tails you lose" scheme can be effected, has an unsettling effect on the marketplace. As the Second

Circuit observed in another context, in A.T. Brod & Co. v. Perlow:

> [T]he artificial demand created by purchasing securities which are not to be paid for unless the market value of the stock rises, can have an unsettling and potentially manipulative effect on the securities market -- contrary to the very purpose of the Act. The practices allegedly engaged in by the Perlows represent a violent form of speculation which serves no useful purpose except that the speculator always holds the trump card.

375 F.2d at 397.

Similarly, a holding that permits the management of a target corporation to "hold the trump card" until after a hostile tender offer has been accepted can only inject great uncertainty into the securities market, for no lawful purpose.

B. Sale Of Target Company Stock And A Lock-Up Option By Target Management During Pending Tender Offer Violates Section 14(e) Of The Williams Act, Even If Disclosed Where Free Market For Target Shares Is Artificially Limited.

It is clear that the agreement by Burlington/R-H to terminate the completed December tender offer and issue the revised offer was made specifically in consideration for the agreement by target management to sell 4.16 million shares of unissued stock and an option to purchase an addition 4.95 million shares of El Paso stock to Burlington/R-H. This stock and option sale, made contingent upon the termination of the fully subscribed December tender offer and the submission of the revised offer, allowed Burlington/R-H to assume control of the target upon the purchase of only 21 million shares in the January tender offer. The combination of the stock and option transactions, gave Burlington/R-H control over a substantial block of target stock during the pending tender offer and effectively foreclosed competitive bidding for shares of the

target. Indeed, the termination of the completed December offer and the immediate reissuance of the revised offer was deliberately timed to thwart competitive bids for El Paso stock and to deter any action contemplated by target investors to reinstate the fully subscribed December offer.

The stock and option agreements negotiated in the case at bar were an integral part of the respondents' manipulative scheme. By the grant of the stock and option sales, target management assured the success of the revised January offer even though substantially fewer shares were sought in the January offer, because the favored bidder already possessed effective control over a substantial block of El Paso stock. The sale of unissued stock and options also lessened competitive pressure in the market for target stock and set an artificial price ceiling in the tender offer market because the favored bidder need to acquire only 21 million shares from the target investors to achieve control, instead of

the 25.1 million original sought in the December tender offer.

The stock and option agreements also acted as an effective deterent to any other potential tender offerors who were placed at a considerable competitive disadvantage compared to the favored bidder. Since the stock and option sales here allowed the favored bidder to control a substantial block of target shares upon the termination of the December tender offer, Burlington/R-H needed to acquire only 21 million additional shares from target investors in the revised offer to win control of El Paso. Any potential, competing tender offeror, on the other hand, would have to acquire more than 30 million shares from target investors, at a price presumably in excess of $24 per share, just to equal the number of shares controlled by the favored bidder. By making it prohibitively expensive for a competitive bidder even to attempt a tender offer, these collusively arranged lock-up options and stock sales distorted the bidding process and depri-

ved target investors of a competitive market for their shares.

The foregoing conduct is no different than that which the Sixth Circuit struck down in Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (1981).

In the Williams Act, Congress sought to establish a regulatory framework designed to encourage free and unrestrained competition in the tender offer process. It was expressly intended that the shareholders of the target, not incumbent management or the bidder, be the ones to decide the contest for control. Lock-up options and stock sales, like those at issue here, effectively disenfranchise target shareholders by ensuring in advance that the only bid capable of success is the one favored by target management. The inherently manipulative nature of these lock-up agreements may be measured in the case at bar by the absence of competitive bids for El Paso stock. Since these collusive agreements served to deter competitive offers, petitioner can only speculate as to the number of

competing bids that would have been made were it not for these lock-up arrangements.

The disclosure of the existence of these lock-up options and stock sales cannot serve to validate the use of these tactics under the facts of this case for at least three reasons: Firstly, target investors were not informed of the existence of these lock-up agreements until after they had been agreed by target management, and at a time when it was already too late for the shareholders to take action. Secondly, disclosure was an essential part of this scheme, because competing bids could not be deterred until the existence of these lock-up agreements was made known to the public. Thirdly, disclosure was specifically intended to encourage target investors to tender their shares to the favored bidder rather than await competing offers because the existence of these agreements would be recognized by target investors to bar any realistic possibility of competing bids. It may be true that target investors were fully informed of the sale

of target stock and lock-up options, but collusion between target management and the favored bidder left target investors with no realistic alternative but to accept the offer favored by management, despite disclosure.

The only profiting entities from this conduct were El Paso management and Burlington/R-H, while the only injured parties were El Paso shareholders who are the intended beneficiaries of the Williams Act provisions.

The lock-up agreements entered into by respondents constitute a deliberate attempt to subvert the auction process and deprive target investors of the benefits of free and unrestrained competition for their shares. The lock-up arrangements here, effectively deterred all competitive offers and left target investors with no real alternative but to submit to the collusive scheme and tender their shares to the bidder favored by target management. It is respectfully submitted that such practices committed in connection with the tender offer are manipula-

tive acts prohibited by Section 14(e) of the Williams Act even though disclosed.

C. Failure To Disclose Golden Parachute Contracts Awarded To Target Management And Other Tender Offer Manipulation Violates Section 14(e) Of The Williams Act And Applicable SEC Rules

The Williams Act requires the tender offeror to disclose material information to the shareholders of the target company so that target investors will be in a position to make an informed choice in the tender of their shares. In the case at bar, the withdrawn December tender offer and the revised January offer were essentially two sides of the same coin. These offers were, in effect, the same offer, except that the revised offer sought 4.1 million fewer shares (at the same "inadequate" price) and the inferior January offer had the support of management, but the December offer did not. In violation of the disclosure provisions of the Williams Act, the revised tender offer failed to disclose the material terms or ratification by the offeror of certain Golden Parachute contracts, and omitted to disclose the fact that target manage-

ment procured the withdrawal of the December tender offer specifically to permit the individual respondents to tender their shares withheld in the prior offer and to assure ratification of these Golden Parachute contracts. Such omissions of material fact served to mislead target investors in violation of Section 14(e) of the Williams Act.

The Courts below erroneously held that petitioner's nondisclosure claims were not actionable because the omissions were viewed as not causally related to petitioner's damages. It is respectfully submitted that the Courts below misconstrued the nature of the transactions at issue. The damages alleged at bar were not the result of one tender offer or the other taken alone, but resulted from respondents' course of conduct that led to the termination of the December tender offer and the submission of the revised January offer.** The failure of the

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**The District Court mistakenly analogized the case at bar to Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied, 454 U.S. 1092 (1981)
(Footnote continued on next page.)

respondents to make full disclosure in the revised offer was an essential part of the collusive scheme which damaged target investors, because omission of these material facts deprived El Paso shareholders of their right to make an informed choice in the revised offer. Since the damages caused to target shareholders resulted from the combination of the withdrawn offer and the submission of the revised offer, omissions of material fact in the January offer and the preceding period were causally related to the damages alleged at bar. Although the Courts below disclaimed any judgment concerning the materiality of the omissions at issue here, it is evident that these nondisclosures were material under the

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(Footnote continued from previous page.)

and Lewis v. McGraw, 619 F.2d 192 (2d Cir. 1980), cert. denied, 449 U.S. 951 (1980). These cases are inapposite since both involved only the withdrawal of a single tender offer, and neither involved the resubmission of a revised offer or allegations of collusion between target management and the offeror which distinguish the case at bar.

facts of this case. The failure of the tender offeror to disclose the terms and ratification of the Golden Parachutes contracts, as well as the fact that target management had procured the withdrawal of the December tender offer, were material omissions because there is a substantial likelihood target investors would have considered such information important in deciding how to vote in the revised tender offer. In addition, target management violated Rule 14(e)-2** by failing to promptly notify target investors of the material change in their position regarding the tender offer and

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** Codified at 17 C.F.R. §240. 14e-2 (1984). The SEC believes that the position of the target company can have a determinative effect on the outcome of a tender offer, and accordingly, target management should not be allowed to "state its position when it maximizes its tactical advantage and to remain silent when it does not... Such complete discretion increases the likelihood for ...fraudulent, deceptive, or manipulative acts." See, Securities Act Release No. 6158, Fed. Sec. L. Rep. (CCH) ¶82,373 at p.82,599 (December 19, 1979).

the factual reasons for such change which deprived El Paso shareholders of the opportunity to withhold their vote in the revised offer and seek reinstatement of the December tender offer.

For the foregoing reasons, it is respectfully submitted that respondents violated the disclosure provisions of Section 14(e) of the Williams Act and Rule 14(e)-2 in failing to disclose material facts concerning the withdrawn December tender offer and the revised January offer.

CONCLUSION

The conduct of respondents plainly violated Section 14(e) and every reason compels the conclusion that the judgments of the Courts below be reversed.

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No. 83-2129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

—against—

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. MCCONN, D.J. MACIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, AND J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Did the courts below err in refusing to create a federal remedy under the tender offer antifraud provision of the federal securities laws for an alleged breach of contract, particularly where:

(a) the statute in question does not, in its terms, create a federal breach of contract remedy;

(b) there is no claim that any person was deceived or misled in any way;

(c) there is no claim of any attempt to artificially affect the market price of any stock; and,

(d) the matters complained of here have traditionally been relegated to state law and indeed are presently the subject of state court proceedings?

THE PARTIES

The parties before this Court are those set forth in the caption, except M.R. Engler, Jr., W.C. Henderson, M.A. Ehrlick, A.M. Derrick, Richard L. McConn, D.J. MacIver, Jr., and L.M. Varen Kamp who were voluntarily dismissed in the trial court, but were inadvertently included in the caption by petitioner. Petitioner agrees that such individuals are not parties to this appeal and that their names should be deleted from the caption.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

–against–

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILIAM V. HOLIK, JR., M. R. ENGLER, JR., W. C. HENDERSON, R. S. MORRIS, M. A. EHRLICK, A. M. DERRICK, RICHARD L. MCCONN, D. J. MACIVER, JR., L. M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W. D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J. R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS

STATUTE INVOLVED

Section 14(e) of the Securities Exchange Act of 1934, 15 U.S.C. §78n(e):

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material

fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

STATEMENT OF THE CASE

This is a claim, as characterized by petitioner, for the allegedly "wrongful termination" of a tender offer.[1] Petitioner seeks to transform this state law breach of contract claim into a cause of action for "fraud" under the federal securities laws, although it is not contended that shareholders were deceived or misled in any way.[2]

A. Burlington's Acquisition of El Paso

On December 21, 1982, Burlington Northern, Inc. ("Burlington"), through a wholly-owned subsidiary, commenced a tender offer for 25.1 million shares of The El Paso Co. ("El Paso") at $24 per share, a substantial premium over the market price of El Paso stock. JA 93. As is customary, Burlington's offer unambiguously provided that if any one of certain specified events occurred, Burlington was entitled to terminate the offer. These events included, among others, litigation seeking to prevent the offer, governmental action directed at the offer, a threatened sale of assets by the target company, issuance of new

[1] Petitioner's Brief at 5, hereinafter referred to as "PB—."

[2] The complaint alleges:

> The improper termination and withdrawal of the tender offer constituted a willful breach of the tender offer agreements.

Joint Appendix at 13 (hereinafter referred to as "JA—").

stock by the target company, changes in the target company's by-laws, or an agreement on a business combination between the offeror and the target company. JA 159-170. There is no factual dispute that a number of these specified events took place, so that the terms of the offer permitted its termination. JA 25-26, 198-213.[3]

El Paso management had initially opposed the offer, and advised its shareholders not to tender their shares. Management believed the price was too low. JA 198. El Paso had also objected to the fact that, if Burlington were to gain majority control of El Paso in the tender offer, there would be no protection against a subsequent merger in which the remaining El Paso shares would be acquired at a price dictated by Burlington. JA 202-204. El Paso also took a number of measures directed at the offer, including, among other things, the institution of litigation seeking to enjoin the offer, the issuance of a new class of preferred stock intended to limit Burlington's voting rights in El Paso, and the announcement of negotiations for the sale of certain of the company's most significant assets. JA 198-213.

When no "white knight" emerged to offer a higher price for El Paso's shares, El Paso and Burlington entered into negotiations which, as is often the case in these matters, ultimately resulted in the combination of the companies. On January 10, 1983,[4] the two companies entered into an agree-

[3] In *Gilbert & Steiner v. Burlington Northern, Inc.*, C.A. Nos. 7075 and 7079 (Del. Ch. Nov. 27, 1984), a decision rendered after the filing of petitioner's brief, the Delaware Court of Chancery, *inter alia*, granted summary judgment to Burlington on the state law breach of contract claim brought by El Paso's shareholders. (A copy of this decision is appended hereto at A-1.) Previously, the Delaware federal court had similarly concluded, in another action brought by El Paso shareholders, that "[b]ecause the December offer contained a number of conditions, some of which occurred, the December offer could have been terminated and withdrawn anytime . . . prior to acceptance by Burlington for payment." *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893, 898 (D. Del. 1984).

[4] At that time, El Paso shareholders who had tendered their shares still had two more days in which they could withdraw these tenders, and presumably would have done so if a higher bid had been made. JA 60, 78-82. Petitioner's statement that Burlington "held majority control" of El Paso at the time is simply wrong. PB 6.

ment which provided, *inter alia*, that (i) Burlington would terminate the December offer in accordance with the offer's previously disclosed terms, (ii) Burlington would purchase 4,166,667 shares from El Paso at $24 per share, representing an infusion of $100 million of capital into El Paso, (iii) Burlington would commence a new offer for 21 million shares at $24 per share, (iv) Burlington would not acquire the remaining shares of El Paso unless any such transaction was approved by El Paso directors who were not designated by Burlington and by an affirmative vote of the El Paso shareholders other than Burlington, (v) El Paso would rescind its issuance of preferred stock and a by-law relating to shareholder consents, (vi) all litigation between the parties would be terminated, and (vii) Burlington would receive an option to purchase 4,950,000 El Paso shares (about 8% of the company's shares) at $24 per share. JA 234-236.

The agreement was beneficial to Burlington, El Paso and El Paso's shareholders. Burlington was freed from the threat of an injunction against the offer, the dilution of its voting rights, and the possible sale of critical El Paso assets. El Paso and its shareholders received $100 million in needed equity capital, and important protections regarding any ultimate merger transaction.[5] *All* El Paso shareholders, including those holding over 25 million shares which were not tendered pursuant to the first offer, were given the opportunity to consider and participate in Burlington's second offer. Many shareholders had not tendered their shares, upon management's recommendation, in the hope that a higher competing offer could be found. They were no longer able to tender their shares pursuant to the first offer because the proration period had expired.[6] When El Paso

[5] In fact, Burlington acquired the remaining El Paso shares later in 1983, in a transaction which was approved in accordance with the procedures mandated by the agreement between Burlington and El Paso, and in which shareholders received consideration equal in value to the price paid in the tender offer.

[6] Under the terms of the first offer, if the offer was oversubscribed, all those who tendered stock within the first ten days of the offer would have a prorated portion of their shares accepted and shareholders who subsequently tendered would not have their shares purchased. This cannot happen under present SEC rules, which require proration to extend throughout the duration of an offer. *See*, 17 C.F.R. § 240.14d-8. This means that all shares tendered throughout the duration of the offer must now be purchased on a pro rata basis.

management was unable to find a higher offer, it bargained for the right to permit all shareholders to consider the only offer then available.

On January 11, 1983, Burlington commenced its second, or January, tender offer for El Paso shares. JA 12, 27. This offer provided, in accordance with the Williams Act, that any tendered shares could be withdrawn prior to January 31, 1983, and that Burlington could not purchase any shares until February 8, 1983. Thus, a competing offer for El Paso stock could have been made during these new periods. No such offer eventuated, and on February 8, 1983, after more than 40 million shares had been tendered, Burlington accepted, on a pro rata basis, 21 million shares for payment. JA 27.

It is this conduct, all of which was fully disclosed to El Paso shareholders, that is claimed to be a "fraud" under the federal securities laws. There is no claim that El Paso shareholders were misled or deceived in any way, or that there was any attempt to artificially affect the market for El Paso stock. There is no claim that there was any available higher offer that was thwarted by the agreement. The ultimate result was that, pursuant to an agreement between Burlington and El Paso, Burlington acquired El Paso at an acquisition price which represented a substantial premium to El Paso shareholders.

B. The District Court's Opinion

This action purports to arise under section 14(e) of the Securities Exchange Act of 1934 (the "1934 Act"), an antifraud provision relating to tender offers added to the 1934 Act by the Williams Act. The district court dismissed the complaint, holding that it did not allege conduct constituting manipulation under this provision. It held that to state such a claim, the alleged manipulative activity "must *artificially affect* the marketplace *and* do so in a misleading or deceptive manner." (Emphasis in original.) JA 37. In the present case, however, "[a]ll activity of the defendants that could have conceivably affected the price of the El Paso shares was done openly." JA 40.

The court reasoned that if conduct of the nature involved in this case constituted manipulation, "then potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated." JA 40. The Court concluded that because "there was no deception practiced upon the shareholders in terminating their alleged contractual rights, there was no manipulative violation within the meaning of Section 14(e). . . ." JA 43.

C. The Court of Appeals' Opinion

The Court of Appeals for the Third Circuit affirmed. It concluded that "§ 14(e) was not intended to create a federal cause of action for all harms suffered because of the proffering or the withdrawal of tender offers." JA 56. Rather, "Section 14(e) was enacted principally as a disclosure statute, designed to insure that fully-informed investors could intelligently decide how to respond to a tender offer." JA 56.

The court held that the more "open-ended notion of manipulative acts," suggested by *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), would "transform all decisions by bidders or by target management that affect a tender offer contest into 'artificial influences,'" and concluded that "[a]bsent a requirement of deception, the Williams Act would mandate that the federal courts supervise the substantive fairness of practically all tender offers." JA 57-58.

SUMMARY OF ARGUMENT

This Court has comprehensively reviewed the 1934 Act, the Williams Act amendments to that Act and their complementary antifraud provisions (sections 10(b) and 14(e)).[7] This review leads ineluctably to the conclusion that these antifraud provisions cover only conduct which is deceptive in nature and do not apply where the claim is, in essence, one of breach of contract or violation of fiduciary duties. In *Ernst &*

[7] 15 U.S.C. §§ 78j(b), 78n(e) (1981).

Ernst v. Hochfelder[8] and *Santa Fe Industries, Inc. v. Green*,[9] the Court described the 1934 Act as principally intended to protect investors through a philosophy of full disclosure. Manipulation was defined as a term of art requiring intentional or willful conduct designed to mislead investors by creating a false impression of market activity. In the latter case, this Court held that the antifraud provisions of section 10(b) were inapplicable once full and fair disclosure had occurred.

In *Rondeau v. Mosinee Paper Corp.*[10] and *Piper v. Chris-Craft Industries, Inc.*,[11] the Court dealt specifically with the Williams Act amendments to the 1934 Act. It held that the Williams Act was solely a disclosure statute enacted to remedy a gap in the 1934 Act by extending the coverage of the Act to cash tender offers. Recognizing Congress' explicit intent, the Court refused, in *Rondeau*, to permit injunctive relief absent proof of traditionally required predicates, and in *Piper*, to imply a private right of action for damages in favor of an offeror. In each case the plaintiff failed to show that implication or extension of a Williams Act cause of action was evidenced by congressional intent or necessary to effectuate the purposes of the Act.

As in *Rondeau* and *Piper*, petitioner's efforts to create a § 14(e) cause of action for the alleged breach of a tender offer contract must be similarly unavailing. Petitioner's interpretation of § 14(e) finds no support in legislative history and would constitute a serious departure from this Court's long-standing construction of the 1934 Act. Likewise, the contention that manipulation may be found absent nondisclosure or the intent to mislead investors directly contradicts the Court's statements in *Hochfelder, Santa Fe* and *Piper*, and the recent conclusions of seven courts of appeals.[12]

Petitioner claims that the use of the word "fraud" in § 14(e) proves that every kind of wrongdoing is comprehended by the Williams Act amendments. This view is without any support. It ignores the fact that § 14(e) was meant only to fill the gap in the antifraud coverage already provided by other sections of the 1934 Act, and not to substantively broaden the

[8] 425 U.S. 185 (1976).
[9] 430 U.S. 462 (1977).
[10] 422 U.S. 49 (1975).
[11] 430 U.S. 1 (1977).
[12] *See* discussion *infra* n. 22.

scope or concept of federal regulation. It ignores the plain meaning of fraud under both the securities laws and generally, a meaning rooted in the concepts of deception, misrepresentation and trickery. And it ignores that Congress intended to provide the same regulatory framework for tender offers as was already in existence for proxy contests, in which federal law mandates and regulates disclosure, and state law continues to regulate matters of corporate governance.

State law has traditionally provided remedies for breach of contract, violation of fiduciary duties, self-dealing, and similar matters, and has done so when such conduct occurs in the context of a tender offer or other contest for corporate control.[13] Congress has shown no intention to displace state law in these areas, or to create a federal common law of contract or fiduciary duty, and has provided no standards that could possibly delimit any such causes of action. For the courts to set these standards would be to assume a legislative function that this Court has continually warned against. Congress is presently considering various proposals for significant amendments to the Williams Act, and will have the opportunity to specify the conduct that it wishes to regulate.

The case at bar is surely not the vehicle to expand § 14(e), even assuming that such an expansion was thought to be a wise one. The alleged violation — a supposed "wrongful termination" of a tender offer — would not amount to fraud or manipulation under any definition. This case does not involve an intentional manipulation of the market for or price of securities. It does not involve devices intended to assure that a tender offer would not succeed. It does not involve a distortion of the balance of power between a target and a bidder. The claim, rather, is for breach of contract, a state law claim under any standard. The decisions below were clearly correct and should not be disturbed.

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[13] Indeed, in the present case, the Delaware Chancery Court is considering, under the appropriate state-law standards, the same claims petitioner is presenting here, and has already ruled that there was no breach of the tender offer contract. *Gilbert & Steiner v. Burlington Northern, Inc., supra* n. 3.

ARGUMENT

POINT I

THE WILLIAMS ACT DOES NOT CREATE A FEDERAL REMEDY FOR ALLEGED BREACHES OF CONTRACT

A. The plain language of the statute bars the petitioner's federal claims.

Petitioner's claim that section 14(e) of the 1934 Act somehow authorizes the federal courts to supplant traditional state law remedies for breaches of contract (and to create new federal remedies therefor) finds no support in the language of the statute.[14] Nowhere in that section or any section of the Act did Congress articulate any federal interest in, or remedy for, an alleged breach of contract, and no court has ever held such an interest, or remedy, to exist.

While section 14(e) *does* make it "unlawful" for any person to engage in "fraudulent, deceptive or manipulative acts or practices in connection with any tender offer," it *does not*, by its terms, federalize actions, such as this one, which complain of nothing more than a simple breach of contract.[15] As we will show, under principles well established by this Court, an alleged breach of contract is neither fraudulent, nor deceptive,

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[14] It is axiomatic that in construing the meaning of a statute, the starting point in the analysis is the language of the statute itself. As the Court explained, it is assumed "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards v. United States*, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

[15] The SEC, which is mandated by the statute to "define . . . such acts and practices as are fraudulent, deceptive, or manipulative," has never suggested that an alleged breach of a tender offer contract falls within any of these categories. 15 U.S.C. § 78n(e).

nor manipulative. In the absence of statutory ambiguities, this Court should decline Petitioner's invitation to extend the statute far beyond its plain language.

B. The decision below properly applies the teachings of this Court.

Even if it were assumed, *arguendo,* that further analysis were necessary, this Court's well-established precedents under both the Williams Act amendments and section 10(b) of the 1934 Act — the statute upon which section 14(e) was largely patterned and molded — demonstrate that an alleged breach of contract does not state a federal claim under the securities laws.

The Court has made it clear that fraud and manipulation under the federal securities laws require deception or the misleading of investors. It has made it clear that the Williams Act amendments to the 1934 Act were intended to extend the disclosure requirements and protections of that Act to tender offers, and not to enlarge the substantive scope of federal regulation. And the Court has made it clear that Congress did not intend by the federal securities laws to supplant traditional state common law.

There are four decisions of this Court — two dealing specifically with the Williams Act, and two with the similar provisions of section 10(b) — in which these fundamental principles are developed.

In *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975), this Court stated that the purpose of the Williams Act "is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." 422 U.S. at 58.[16] The Court

[16] The Court, citing legislative history, also noted that in "requiring disclosure of information," Congress had taken care " 'to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid.' " *Id.* at 58-59. This was done by putting disclosure obligations on both the offeror and target company management, and also by establishing a procedural framework — relating to such factors as the withdrawal of tendered shares and proration rights — within which the disclosure mandated by the Act was to function.

observed that a private cause of action under the Williams Act "is not expressly authorized by the statute or its legislative history." *Id.* at 62. Thus, courts are not free to create sweeping rights or remedies, bounded only by judicial notions of where the "public interest" might lie. *Id.* Rather, the boundaries of the claim, if one is to be implied at all, are to be carefully limited and circumscribed.

In *Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976), the Court, while not dealing directly with § 14(e) or the Williams Act amendments, said much about the antifraud provisions of the 1934 Act and particularly about the concept, central to the present case, of "manipulation" under this statute. It held that *scienter* was required to maintain a claim under section 10(b) and Rule 10b-5, provisions which, taken together, contain the identical language of fraud, deception and manipulation as § 14(e), and are generally considered to be the models for that section.[17] It emphasized as "especially significant," the use of

[17] Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> * * *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5.

the word "manipulative," since this "is and was virtually a term of art when used in connection with securities markets. *It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.*" *Id.* at 199 (emphasis added).

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), the Court dealt directly, and extensively, with the Williams Act itself.[18] The precise issue presented was whether there was an implied cause of action for damages for a tender *offeror* under section 14(e). In deciding this question, the Court exhaustively reviewed the legislative history of the Williams Act and the policies underlying it. The Court observed that the Williams Act amendments to the 1934 Act had been enacted because the advent of tender offers had "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." *Id.* at 22. It was to remedy this gap in federal disclosure requirements, and not to create a "pervasive scheme of federal regulation of tender offers," that the amendments had been proposed. *Id.* at 29.[19]

The Court, in its review of legislative history, pointed out over and again that the Williams Act was essentially a disclosure statute. It observed that "the bill as finally enacted by Congress was styled as a disclosure provision: 'A bill to provide for full disclosure of corporate equity ownership of securities under the Securities Exchange Act of 1934.' " *Id.* at 27. It noted that the sponsors "made it clear that the legislation was designed solely to get needed information to the investor." *Id.* at 30-31.

In reaching its conclusion the Court dealt specifically with the claim that the Act was intended generally to regulate "unfair tactics by entrenched management." References in the legislative history to such conduct merely meant to impose

[18] Curiously, *Piper* is cited only once in petitioner's brief (PB 25) and *Rondeau* is not cited at all.

[19] The Court noted that in addition to disclosure requirements, the Williams Act provided "other benefits for target shareholders" such as proration and withdrawal rights. *Id.* at 23. But these are in the nature of procedural or structural ground rules, similar to those imposed by stock exchanges, and do not deal with the type of substantive conduct traditionally regulated by state law. *See id.* at 23 n. 17.

"disclosure duties upon management" as well as the offeror; by "extending the statute's coverage to solicitations in opposition to tender offers," it was recognized that "full disclosure by all contestants was needed to protect shareholders." *Id.* at 34.

The Court held that the implication of a cause of action under the statute was only proper if "necessary to effectuate Congress' goals." *Id.* at 26. And in dealing with a separate claim under Rule 10b-6, promulgated under the 1934 Act, the Court described that Rule as "an antimanipulative provision," directed at "market tampering" by an issuer of securities "in order to create an unnatural and unwarranted appearance of market activity." *Id.* at 43. Again, the definition of "manipulation" was identical to that in *Hochfelder*, and to that used by the lower courts in the present case.

Two months later, the Court decided *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977), and the themes were the same. The Court pointed out that it had "repeatedly" described the "fundamental purpose" of the 1934 Act "as implementing a 'philosophy of full disclosure;' once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." 430 U.S. at 478. The Court said that it was "reluctant" to recognize a cause of action "to serve a subsidiary purpose" other than the fundamental purpose of full disclosure. *Id.*

The Court said that if the conduct alleged in the complaint before it — basically, breach of fiduciary obligations owed to minority shareholders by a freeze-out merger at an unfair price — was considered to be a Rule 10b-5 fraud, the "result would be to bring within the Rule a wide variety of corporate conduct traditionally left to state regulation." *Id.* Moreover, if the concept of "fraud" were to be so extended, there would be no rational way to distinguish between the conduct alleged in the complaint before the Court, and "other types of fiduciary self-dealing involving transactions in securities." *Id.*

The Court went on to point out that any such "extension of the federal securities laws would overlap and could possibly interfere with state corporate law." *Id.* at 479. It concluded that

> [a]bsent a clear indication of Congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.

Id.

The Court also dealt again, as in *Hochfelder* and *Piper,* with the concept of manipulation under the federal securities laws and again reached the same conclusion. The Court held that "manipulation," as "virtually a term of art when used in connection with securities markets, . . . refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Id.* at 476. It found that "manipulative" had been used by Congress "in this technical sense," and concluded that Congress would not have chosen this "term of art" if it had intended to cover instances "in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary." *Id.* at 477.

These four cases necessarily set the framework in which this case must be viewed.[20] And the principles they establish, taken singly or together, make it evident that the present breach of contract complaint does not state a federal claim. Thus, it is clear that:

1. The antifraud provisions of the federal securities laws cover only conduct which is deceptive in nature, and

[20] *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), dealt with the Williams Act, but is not singularly pertinent to the issues now before the Court. That case dealt with the constitutionality of state statutory provisions which conflicted with the procedural framework for tender offers previously established by the Williams Act. There is no claim here that any state corporate law, contract or fiduciary principles are inconsistent with any provisions of the Williams Act. Indeed, to the extent that *MITE* is relevant here, it reaffirms the principles articulated in the earlier cases, for the Court reiterated that the Williams Act was intended to fill the "regulatory gap" in the 1934 Act by extending federal disclosure regulations to tender offers. *Id.* at 632.

do not cover conduct where the claim is, in essence, one of breach of fiduciary duties, mismanagement, or breach of contract.

2. "Manipulation" under the federal securities laws means conduct "artificially affecting market activity in order to mislead investors." *Santa Fe,* 430 U.S. at 477.[21]

3. The Williams Act is "a disclosure mechanism" which "was designed solely to get needed information to the investor." *Piper,* 430 U.S. at 31, 39. It was enacted to extend to tender offers the federal disclosure regulations already in existence for other corporate control contests, such as proxy contests.

4. In the absence of the clearest evidence of congressional intent, the Court will not federalize the regulation of conduct that has traditionally been governed by state law, and will not create a federal law of corporate governance; and

5. Implicit private rights of action under the federal securities laws will be created, defined and extended only insofar as "necessary" to effectuate the clearly-expressed intent and goals of Congress.[22]

[21] A good example of manipulation in the tender offer context is found in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied,* 400 U.S. 822 (1970). In that case, one of two contestants for control of a target company engaged in last minute transactions in the target company's securities designed to drive the price of these securities to a level higher than its rival's tender offer price. The court, in finding this practice to be manipulative, pointed out that its result "was to represent to the public . . . that there was a great demand for Air Brake at an increased value." This "inevitably distorted the market picture and deceived public investors," since its effect was "to create the appearance of an extraordinary demand for Air Brake stock and a dramatic rise in market price, as a result of which Air Brake shareholders were deterred from tendering to Crane." *Id.* at 792-793.

[22] The courts of appeals have also continually held that section 14(e) was not intended to regulate the substantive conduct of the

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Also pertinent here is the observation made in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), and reiterated in *Santa Fe*, 430 U.S. at 478-479, as to the potential

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participants in the tender offer process. In addition to the decision of the Third Circuit in the present case, *see also:*

Second Circuit: *Buffalo Forge Co. v. Ogden Corp.*, 717 F.2d 757, 760 (2d Cir.) *cert. denied*, 104 S. Ct. 550 (1983) (Williams Act "was designed solely to get needed information to the investor"; "Congress's ban on 'manipulative acts and practices' was directed only at rigged transactions that might mislead investors" in the making of investment decisions;

Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 4, 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984) (stock option given to "white knight" for 200% of target company's stock not violative of section 14(e) even though it made it impossible for hostile offeror to gain control; section 14(e) did not authorize federal courts "to review the substantive validity of corporate actions undertaken during the course of a tender offer," since to do so would improperly impose "judge made substantive obligations" upon the participants in a tender offer contest);

Fourth Circuit: *Dan River, Inc. v. Icahn*, 701 F.2d 278, 288 (4th Cir. 1983) (sole purpose of section 14(e) is to insure adequate disclosure to shareholders; practice which creates uncertainty in a tender offer not manipulative since "[m]ost tender offers include conditions which make acceptance of the tender uncertain");

Fifth Circuit: *Gearhart Indus., Inc. v. Smith International, Inc.*, 741 F.2d 707, 724 (5th Cir. 1984) (issuance of securities making it more difficult for hostile offeror to succeed not violative of § 14(e) since there was no evidence of "any intent . . . to deceive, defraud, or mislead investors");

Seventh Circuit: *Panter v. Marshall Field & Co.*, 646 F.2d 271, 283 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981) (§ 14(e) "is intended to protect shareholders from making a tender offer decision on inaccurate or inadequate information");

Atchley v. Qonaar Corp., 704 F.2d 355, 359 (7th Cir. 1983) ("*Santa Fe* analysis is the same for claims under Section 14(e) as it was for claims under Section 10(b)");

Eighth Circuit: *Feldbaum v. Avon Products, Inc.*, 741 F.2d 234, 237 (8th Cir. 1984) (option for 25% of a company's shares given to potential merger partner not violative of section 14(e) since the "federal purpose is served once material facts are revealed so that the shareholder has enough information to make an intelligent decision");

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for abuse in this kind of litigation. As the *Blue Chip* Court found, "in this type of litigation . . . the mere existence of an unresolved lawsuit has settlement value to the plaintiff . . . because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial . . . ." *Id.* at 742-743.

This danger is well illustrated in the tender offer context by the aftermath of the Sixth Circuit's holding in *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), that certain options given in a tender offer contest were manipulative devices under the Williams Act. Since that decision, almost every event that has taken place in a tender offer has been similarly challenged as a "manipulative device." While these actions have been uniformly unsuccessful, the vexatiousness and disruption are precisely what the *Blue Chip* Court had foreseen. Indeed, the burden on a single party, Burlington, which did nothing other than acquire a company at premium prices, is demonstrated by the shareholder litigation

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Ninth Circuit: *Pacific Realty Trust v. APC Investments, Inc.*, 685 F.2d 1083, 1086 (9th Cir. 1982) (manipulation limited to practices intended to mislead investors by artificially affecting market activity").

The one contrary decision is *Mobil Corp. v. Marathon Oil Co.*, 669 F.2d 366 (6th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982), in which the Court of Appeals for the Sixth Circuit held that certain options granted to a favored white knight violated § 14(e). The most significant factor in that case was a "crown jewel" option given on the target company's most valuable asset, so that even if the hostile offeror decided to compete, that asset would no longer be available. In addition, the stock option granted in *Mobil* was at a price that was far below the white knight's tender offer price, so that any competing hostile offeror would have had to pay the white knight literally hundreds of millions of dollars in windfall profits. Recently, in *Biechele v. Cedar Point, Inc.*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,829 (6th Cir. November 8, 1984), the Sixth Circuit retreated from *Mobil;* the court found that, because of its "unusual" facts, *Mobil* "was not to be broadened and applied indiscriminately." *Id.* at 90,173. The conduct in question in *Biechele* was found not to be manipulative because it "would not inhibit third party bidders if they were otherwise interested" and did not artificially affect market activity in order to mislead investors. *Id.* at 90,175.

instituted with respect to this transaction.[23] If the Williams Act is meant to encourage tender offers, as petitioner suggests, it hardly furthers this purpose to subject an offeror which has already paid premium prices to acquire all of a company's stock to such a barrage of litigation. If tender offers are ultimately discouraged by a proliferation of claims of this nature, the interests of all shareholders will have been disserved and congressional policies subverted.

POINT II

THE ARGUMENTS MADE BY PETITIONER ARE CONTRARY TO THE CONTROLLING PRINCIPLES ESTABLISHED BY THIS COURT AND ARE CLEARLY WITHOUT MERIT

The principles expressed repeatedly by this Court are themselves a complete answer to the arguments made by Petitioner. But, at the risk of further repetition, we will treat Petitioner's arguments separately and explicitly, noting at the outset that there are no decisions from this Court or any court which support the transformation of a breach of contract action into a fraud claim under the federal securities laws.

A. The legislative history of the Williams Act evidences no congressional intent to create broad federal regulation of the substantive conduct of participants in tender offers.

The legislative history of the Williams Act was painstakingly analyzed by this Court in *Piper*, and, as we have noted,

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[23] In addition to the present case, *see Gilbert & Steiner v. Burlington Northern, Inc.*, Nos. 7075 and 7079 (Del. Ch., filed January 17, 1983) (claim that withdrawal of initial offer was a breach of contract dismissed on summary judgment; claim of breach of fiduciary duty pending); *Gelobter v. Petty*, No. 7087 (Del. Ch., filed January 31, 1983) (derivative claim alleging corporate waste and breach of fiduciary duty in connection with Burlington's tender offers dismissed); *Smachlo v. Birkelo*, 576 F. Supp. 1439 (D. Del. 1983) (derivative and class claims for breach of fiduciary duty and corporate waste in connection with Burlington's tender offers dismissed); *Brill v. Burlington Northern, Inc.*, 590 F. Supp. 893 (D. Del. 1984) (claims brought pursuant to §§ 14(d)(6), 14(d)(7), 14(e) and 20 of the Exchange Act dismissed).

the Court's conclusion as to the Act's purpose was clear. A brief review makes it evident that there was no contemplation of regulating conduct such as that involved in the present case.

Prior to 1968, the 1934 Act imposed extensive disclosure requirements on exchange offers and proxy statements, but did not provide for disclosure in connection with cash tender offers even though such offers involved similar investment decisions. S. Rep. No. 550, 90th Cong., 1st Sess. 3-4 (1967).[24] The Williams Act amendments were proposed in response to the increased use of cash tender offers in corporate acquisitions, a device that had removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws. *See generally*, S. Rep. No. 550, 90th Cong., 1st Sess., 2-4 (1967); H.R. Rep. No. 1711, 90th Cong., 2nd Sess., 2-4 (1968).

As described by their sponsor, the Williams Act amendments were intended to "close a significant gap in investor protection under the federal securities laws *by requiring the disclosure of pertinent information to stockholders* when persons seek to obtain control of a corporation by a cash tender offer or through open market or privately negotiated purchases of securities." 113 Cong. Rec. 854 (1967) (emphasis added). Immediately prior to the passage of his bill by the Senate, Senator Williams explained:

> Today, the public shareholder in deciding whether to reject or accept a tender offer possesses limited information. No matter what he does, he acts without adequate knowledge to enable him to decide rationally what is the best course of action. This is precisely the dilemma which our securities laws are designed to prevent . . . . [*The bill*] *is designed solely to require full and fair disclosure for the benefit of investors* . . . .

113 Cong. Rec. 24664 (1967) (emphasis added).

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[24] This Court has repeatedly observed that the fundamental purpose of the 1934 Act is " 'to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*. . . .' " *Santa Fe*, 430 U.S. at 477 *(quoting Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972), which was quoting *SEC v. Capital Gains Research Bureau*, 375 U.S. 180, 186 (1963)).

Senator Williams further observed:

> All have recognized the need to fill the existing gap in the disclosure pattern of our securities laws.
>
> The full disclosure principle was thought to be revolutionary when it was first introduced into the securities marketplace more than 30 years ago. Many predicted that it would hamper or even strangle the operations of our free enterprise system. The facts have proven otherwise. Full disclosure has given the investing public confidence in our free enterprise system. Following this premise, our Nation's securities markets have thrived and prospered over the years. *With this legislation, I am sure that we will eliminate one of the last remaining areas where full disclosure is necessary but not yet available.*

Id. at 24664-65 (emphasis added).[25]

The Williams Act was intended to do no more in the area of tender offer regulation than the other disclosure provisions in the 1934 Act had done in their respective fields, particularly that of proxy contests. Senator Williams explained:

> This legislation fills a gap which now exists in our securities laws dealing with full disclosure of corporate equity ownership. This one area has been overlooked until now — the area where ownership of companies is sought through what is called the cash-tender offer.

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[25] *See also,* the statement of Manuel Cohen, then Chairman of the SEC:

> "[T]he general approach of . . . this bill is to provide the investor, the person who is required to make a decision, an opportunity to examine and to assess the relevant facts. . . ."

S. Rep. No. 550, 90th Cong., 1st Sess., 15 (1967).

> What this bill would do is to provide the same kind of disclosure requirements which now exist, for example, in contests through proxies for controlling ownership in a company.

Id. at 24665. After further discussion, Senator Javits inquired about the scope of the proposed legislation.

> Mr. JAVITS. . . . One last question on this score: The Senator represents to the Senate, and I accept his representation fully, that this is analogous to the proxy rules, so that very much the same principles obtain as to . . . a takeover, as to a proxy fight by a group of stockholders.
>
> Mr. WILLIAMS. This legislation is patterned on the present law and the regulations which govern proxy contests.

Id.

There is no evidence whatever that any broad-scale regulation of substantive conduct was contemplated. As the *Piper* court found, neutrality regarding offerors and targets was only "one characteristic" of the Williams Act and evidenced no intention to enact "a pervasive scheme of federal regulation of tender offers." 430 U.S. at 29. Congress had in fact refused to enact any substantive restrictions on either the takeover bidder or incumbent management:

> The sponsors of this legislation were plainly sensitive to the suggestion that the measure would favor one side or the other in control contests; however, they made it clear that the legislation was designed solely to get needed information to the investor. . . .

Id. at 30-31.[26]

Petitioner offers nothing that in any way contradicts this record. There is not the slightest support for the idea, proffered without citation, that in "enacting Section 14(e), Congress sought to establish uniform and consistent standards for the resolution of tender offer disputes." PB 14. To the extent that fragmentary or generalized references are made to conduct not involving failure to disclose (see PB 31-32), they evidence no congressional intent to create the broadly gauged cause of action that Petitioner proposes. The references, rather, are to insider trading activities—a most traditional form of deceptive conduct—or to the procedural ground rules established as a framework in which the disclosure obligations placed on both sides were to operate. There is not a word to suggest that Congress intended to bring under the federal mantle the regulation of fiduciary obligations, contractual relationships, or other substantive conduct of the participants in tender offers.

B. The conduct alleged in the complaint does not constitute manipulation within the meaning of the securities laws.

The argument that the conduct alleged in the complaint constitutes manipulation, to the extent it is seriously pressed, cannot survive the three decisions of this Court holding that the *misleading of investors* is a prerequisite to any claim of manipulation under the federal securities laws. In the present case, the "wrong" alleged is the supposed breach of a tender offer contract, pursuant to a fully disclosed agreement, and no

[26] The "neutrality" contemplated by Congress was accomplished by imposing disclosure obligations on both sides, and by eliminating a previously proposed provision, now thought to unduly favor management, requiring advance notice of any tender offer. There is no indication that any substantive conduct was to be regulated or prohibited. *See* Note, *Protecting Shareholders Against Partial and Two-Tiered Takeovers: The "Poison Pill" Preferred*, 97 Harv. L. Rev. 1964, 1981-82 (1984).

investors were misled. This Court's dispositive statements on manipulation leave no room for argument.[27]

There is no conceivable way that the conduct alleged in the complaint can meet the test set forth in these cases. This case concerns a fully disclosed agreement whereby Burlington acquired El Paso, benefits were obtained by both parties, and all El Paso shareholders were given the opportunity to tender their shares at premium prices. No one sought to alter or affect the price of El Paso stock, to create the appearance of market activity or market demand that did not really exist, or to conceal any information from El Paso shareholders. Shareholders were fully informed of the conditions in the tender offer contract, which were invoked in accordance with their terms.[28] As the district court concluded, if this is manipulation, "then

[27] *Hochfelder* — Manipulation "is and was virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities." 425 U.S. at 199.

Piper — Manipulation is "market tampering" activity undertaken "in order to create an unnatural and unwarranted appearance of market activity." 430 U.S. at 43.

Santa Fe — Manipulation "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." 430 U.S. at 476.

See also, e.g., Billard v. Rockwell Int'l Corp., 526 F. Supp. 218, 222 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 51 (2d Cir. 1982) (manipulation refers to devices " 'used to persuade the public that activity in a security is the reflection of genuine demand instead of a mirage' "); *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979).

The law review article that appears to be a significant source for Petitioner's argument similarly concludes that "the current meaning of 'manipulative' under section 14(e) incorporates nondisclosure as an essential element." Junewicz, *The Appropriate Limits of Section 14(e) of the Securities Exchange Act of 1934*, 62 Tex. L. Rev. 1171, 1204 (1984).

[28] Conditions in a tender offer are intended to protect the offeror against contemplated risks and expenses, such as the risk of the sale of the target company's valuable assets. Millions of dollars are typically committed to tender offer acquisition efforts, and if it were somehow federal law that conditions could not be included, or that to invoke them would constitute manipulation, tender offers would not be made.

potential offerors and management of target companies would be subject to liability every time a tender offer is revised or negotiated." JA 40. This would stifle rather than promote market activity and is the antithesis of what Congress intended.

C. There is no basis for interpreting section 14(e) more broadly than section 10(b). Both sections are directed at fraud, which is traditionally understood in the federal securities laws to require deceptive conduct.

Petitioner ultimately appears to recognize that, in light of this Court's decisions, manipulation under the federal securities laws has a well-defined meaning which cannot be extended to cover the conduct at bar. She appears to rely primarily, instead, on the argument that section 14(e) should be interpreted more broadly than section 10(b) because it contains the word "fraudulent" while section 10(b) does not. This concept, though novel, has no support in history, logic or precedent.[29]

In the first place, it ignores the fact that the Williams Act amendments were enacted to extend to tender offers the disclosure regulation already provided for proxy contests and other securities transactions, and not to embark upon a wholly new plan for the regulation of substantive corporate conduct.

Although the legislative history to this end is uncontradicted, Petitioner nevertheless argues that there was no gap in the coverage of the 1934 Act's antifraud provisions and therefore that section 14(e) must have been directed at broader goals. She says, in this regard, that "there was no doubt whatsoever" prior to the Williams Act "that section 10(b) and Rule 10b-5 applied to tender offer disclosures." PB 29. But the fact is that there was a plain gap in the coverage of section

[29] This argument appears to have its genesis in the recent Junewicz article (62 Tex. L. Rev. 1171), and was not made by Petitioner in either the court of appeals or the district court. It appears, moreover, that Junewicz himself is not entirely convinced, for in another recent article which he co-authored, it is concluded that "[a]fter *Santa Fe*, any substantial regulation of corporate responses to attempted acquisitions must be achieved at the state level." Greene and Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, 132 U. Pa. L. Rev. 647, 711 (1984).

10(b), relating to the categories of persons who could bring suit under that section, which the new statute, and section 14(e) in particular, was clearly intended to fill.

While *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), had, of course, not been decided at the time the Williams Act was enacted, the principle it ultimately adopted, limiting standing under section 10(b) to actual purchasers and sellers of securities, was generally considered to be the law. *See, e.g., Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952). The difference in operative language of the two antifraud provisions — "in connection with the purchase and sale" of securities in section 10(b), and "in connection with any tender offer . . . or any solicitation . . . in opposition to or in favor of such offer" in section 14(e) — was thus critical, for it broadened the class of potential plaintiffs to include those who might have been induced by fraud *not* to tender their shares.[30]

More fundamentally, the thought that section 10(b) was *not* directed at "fraud," as that term has been traditionally understood under the securities laws, is one that dies in the face of years of unbroken precedent, analysis and discussion. Sec-

[30] The Court in *Piper* noted that it "may well be that Congress desired to protect, among others, shareholder-offerees who decided not to tender their stock due to fraudulent misrepresentations by persons opposed to a takeover attempt." 430 U.S. at 38. Similarly, in his dissent in *Piper*, Justice Stevens cited with approval Judge Friendly's statement, in *Electronic Specialty Co. v. Int'l Controls Corp.*, 409 F.2d 937, 940-941 (2d Cir. 1969), that section 14(e)'s "only possible addition to existing case law was its possible impact on standing. . . ." 430 U.S. at 64. *See also Smallwood v. Pearl Brewing Co.*, 489 F.2d 579 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974):

> To charge violations of Section 14(e) in federal court a private plaintiff need not be a purchaser or a seller of any securities, as he must be to sue under Rule 10b-5. *This is the primary contribution of the Williams Act to the antifraud arsenal;* under Section 14(e) a plaintiff may gain standing if he has been injured by fraudulent activities of others perpetrated in connection with a tender offer, whether or not he has tendered his shares.

489 F.2d at 596 (emphasis added) (footnotes and citations omitted).

tion 10(b) has long been considered by everyone, and particularly by this Court, to be precisely directed at "fraud"; indeed, it is generally considered to be the exemplar of antifraud provisions. Section 14(e) — designed largely to fill a gap in section 10(b)'s coverage — could rationally go no further.

In *Santa Fe* itself, the case in which the requirement of deception was pronounced, the Court referred to section 10(b) as among "the antifraud provisions of the Securities Exchange Act," and to the concept of "Rule 10b-5 fraud." 430 U.S. at 477-478.[31] And in case after case, both before and after *Santa Fe,* identical language and concepts were used.

In *SEC v. National Securities, Inc.,* 393 U.S. 453 (1969), Justice Marshall wrote that "Section 10(b) and Rule 10b-5 together constitute one of the several broad antifraud provisions contained in the securities laws," and he referred to the "broad antifraud purposes of the statute and the rule . . . ." *Id.* at 466-467.[32] In *Superintendent of Ins. of New York v. Bankers Life & Casualty Co.,* 404 U.S. 6 (1971), the Court used the concepts of fraud and deception interchangeably and continually referred to the conduct at issue under section 10(b) as fraud. In *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), the Court, in interpreting section 10(b), pointed out that this was legislation "enacted for the purpose of avoiding frauds . . . ." 406 U.S. at 151.

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[31] *See also* Justice Stevens' concurring opinion in *Santa Fe:* "The facts alleged in the complaint do not constitute 'fraud' within the meaning of Rule 10b-5." 430 U.S. at 481.

[32] Petitioner cites an earlier decision, *SEC v. Capital Gains Research Bureau,* 375 U.S. 180 (1963), for the proposition that fraud under the securities laws includes the situation "where fiduciaries breach their fiduciary duty or there is other egregious conduct." PB 34. But this precise argument was made and rejected in *Santa Fe,* where the Court noted that the references in the *Capital Gains* decision "to fraud in the 'equitable' sense of the term were premised on its recognition that Congress intended the Investment Advisors Act to establish federal fiduciary standards for investment advisers," and that "the fraud that the SEC sought to enjoin in *Capital Gains* was, in fact, a nondisclosure." 430 U.S. at 471 n. 11. The Court in *Capital Gains* also spoke of the "philosophy of full disclosure" as the "fundamental purpose" underlying the securities laws. 375 U.S. at 186.

In *Blue Chip,* the Court said that the statute's wording was "directed at fraud." 421 U.S. at 733. Justice Blackmun's dissenting opinion similarly pointed out that the "question under both Rule 10b-5 and its parent statute, § 10(b), is whether fraud was employed" (*id.* at 768), and that § 10(b) was intended by Congress to be "a broadranging antifraud provision." *Id.* at 770.

In *Foremost-McKesson, Inc. v. Provident Securities Co.,* 423 U.S. 232 (1976), the Court, while dealing with another section (§ 16(b)) of the 1934 Act, noted that section 10(b) was among the "general antifraud statutes" to which an investor might have recourse. 423 U.S. at 255. In *Hochfelder,* Justice Powell, writing for the Court, described the Court's holding as being "that an intent to deceive, manipulate, or defraud is required for civil liability under § 10(b). . . ." 425 U.S. at 191-92 n. 7. And in *Aaron v. SEC,* 446 U.S. 680 (1980), Justice Blackmun, in a concurring and dissenting opinion joined by Justices Brennan and Marshall, characterized section 10(b), along with section 17(a) of the Securities Act of 1933, as "the primary antifraud provisions of the federal securities laws." 446 U.S. at 704.

Chiarella v. United States, 445 U.S. 222 (1980), was a critical decision dealing with section 10(b), and there were sharp divisions within the Court on the precise issue before it. But there was no disagreement on the basic nature of section 10(b) as an antifraud statute. In Justice Powell's decision for the Court, he noted that "Section 10(b) was designed as a catchall clause to prevent fraudulent practices." 445 U.S. at 226. The Chief Justice, in his dissent, pointed out that the "provisions reach *any* person engaged in *any* fraudulent scheme" (*id.* at 240), while Justice Blackmun, also dissenting, expressed the identical view. *Id.* at 250.[33] The thought that section 14(e) is somehow *broader* in concept and scope than a statute that has been so characterized is hardly consistent with these statements.

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[33] Justice Blackmun also said, with reference to *Santa Fe,* that "the securities laws were not intended to replicate the law of fiduciary relations." *Id.* at 248.

The Court had occasion to twice consider section 10(b) in 1983, and again the results, insofar as the present point is concerned, were the same. In *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), Justice Marshall, speaking for the Court, pointed out that section 10(b) was the "established remedy for fraud." 459 U.S. at 381. He described section 10(b) as a "catchall antifraud provision" and wrote of "the broad proscription against fraud in § 10(b)." *Id.* at 382, 386. In *Dirks v. SEC*, 463 U.S. 646, 77 L. Ed. 2d 911 (1983), Justice Powell, writing for the Court, observed that the statutory words "manipulative," "device," and "contrivance" connoted conduct "designed to deceive or defraud investors." *Id.* at 927 n.23.

Thus, the proposition that section 10(b) does not expressly use the word "fraud" and thus does not cover "fraudulent" conduct, and therefore that section 14(e) must have a greater substantive reach, has no support. Section 10(b) has always been considered to be the epitome of an antifraud statute, catching in its net the widest variety of securities fraud. Section 14(e), enacted primarily to fill a perceived gap in section 10(b)'s coverage, had no broader intendment.

Moreover, fraud has a well-defined meaning, both under the securities laws and generally, a meaning in which the concepts of deception, misrepresentation and trickery are central, and which plainly does not encompass breach of contract.[34] There is no indication whatever that Congress, in

[34] For example, in Webster's Third New International Dictionary 904 (1981), fraud is defined as:

> An instance or an act of trickery or deceit esp. when involving misrepresentation: an act of deluding . . . an intentional misrepresentation, concealment, or nondisclosure for the purpose of inducing another . . . a false representation of a matter of fact by words or conduct, by false or misleading allegations, or by the concealment of what should have been disclosed that deceives or is intended to deceive . . . a means used in trickery: a dishonest strategem or a spurious thing passed off as genuine . . . the quality of being deceitful.

See also, e.g., Webster's New Collegiate Dictionary 453 (1981) (defining fraud as "deceit" or "trickery"—"intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right"); American Heritage Dictionary 523 (1975) ("A deception deliberately practiced in order to secure unfair or unlawful gain"); The New Encyclopedia Britannica, Vol. IV at 287 (1982) ("the deliberate misrepresentation of fact in order to deprive someone of some valuable possession"); The New York Times Everyday Dictionary 274 (1982) ("a trick, trickster, or trickery;" "[f]raudulent" is anything which is "dishonest" or "deceptive").

formulating section 14(e), intended to use this phrase in any other than its traditionally accepted meaning, particularly when it had before it as models the typical antifraud provisions of the federal securities laws.

There is surely no evidence that Congress meant to define fraudulent conduct, as Petitioner would have it, as "all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another," (PB 35) — a formulation which would cover virtually any form of allegedly wrongful conduct. Fraud under section 14(e), in short, means what it has always universally been understood to mean under the federal securities laws.[35]

D. Each of the words in section 14(e) should be accorded its traditional meaning under the federal securities laws.

Petitioner contends that the use of the language "fraudulent, deceptive *or* manipulative acts" in section 14(e) demonstrates that each of these words must have different meanings and apply to different conduct. This is an argument which, in

[35] While Petitioner refers to the mail fraud statute, 18 U.S.C. § 1341 (1983), as providing "analogous support" for her limitless definition of fraud (PB 36), the cases construing fraud under the mail fraud statute are to the contrary. The federal courts have uniformly held that a mere breach of fiduciary duty, absent an element of nondisclosure or misrepresentation, does not constitute mail fraud. *See, e.g., United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 81 L. Ed. 2d 874 (1984) (fraud found only when breach of duty is accompanied by nondisclosure or misrepresentation); *United States v. Bohonus*, 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (failure to disclose to employer the receipt of kickbacks and a conflict of interest); *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), *modified in part*, 668 F.2d 352 (5th Cir. 1982) (material nondisclosure required); *Epstein v. United States*, 174 F.2d 754 (6th Cir. 1949) (nondisclosure and personal benefit required). In the case cited by Petitioner, *Post v. United States*, 407 F.2d 319 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969) — a case involving material misrepresentations in connection with the sale of club memberships — the court held that "[m]ere breach of fiduciary obligation does not itself constitute active fraud . . . ." *Id.* at 329.

the first instance, proves far too much, for it would have been equally applicable to section 10(b), which speaks of any "manipulative *or* deceptive device," or to rule 10b-5, which speaks of any device, scheme, *or* artifice to defraud," and of practices which would operate "as a fraud *or* deceit upon any person."

As *Santa Fe* teaches, in holding that manipulation requires deceptive conduct, words connected by disjunctives must still be given their ordinary meaning, and the meaning intended by Congress. "The general purpose," said Justice Holmes, "is a more important aid to the meaning than any rule which grammar or formal logic may lay down." *United States v. Whitridge*, 197 U.S. 135, 143 (1935). Justice Brennan similarly reminded, in *United States v. Naftalin*, 441 U.S. 768 (1979), that matters such as punctuation provide "useful confirmation" only "where they reaffirm conclusions drawn from the words themselves." *Id.* at 774 n.5.

The fact is, as this Court has made clear, that each of the words used traditionally requires the element of deception or the misleading of investors, and does not include conduct, such as breach of contract or of fiduciary obligations, normally regulated by state law. No matter how many separate words, phrases or clauses are used in a statute, this is no warrant for distorting any of them beyond their traditional meaning or beyond what is necessary to accomplish articulated congressional objectives. Indeed, placing the words together suggests a clear congressional intent to regulate similar types of conduct, for "a word is known by the company it keeps," a maxim that is "wisely applied" to "avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle Co.*, 367 U.S. 303, 307 (1961).[36] In section 14(e), the words are used together because they have meanings that are consistent with each other, in that they all traditionally refer to conduct that is deceptive in nature.

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[36] This Court recently reiterated the "'familiar principle of statutory construction that words grouped in a list should be given related meaning.'" *Securities Indus. Ass'n v. Board of Governors*, 82 L. Ed. 2d 158, 167 (1984) (citation omitted).

Similarly, the fact that section 14(e) contains three clauses hardly can change the plain meaning of the statutory terms used in each of the clauses. It seems clear that Congress was using the generic language that had been employed in other antifraud provisions; the statutory language appears to be an amalgam of section 10(b) and Rule 10b-5, and certainly evinces no effort to plough new ground. Indeed, the clauses themselves show no inconsistency or redundance; while the first clause deals directly with the disclosures made by offeror and target, the second deals with the type of manipulative practices in tender offers designed to mislead investors exemplified by the conduct involved in *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969), *cert. denied*, 400 U.S. 822 (1970).[37] The third clause is simply the typical mandate given to a regulatory agency to develop rules implementing the statutory policies set forth in the prior clauses, the same type of mandate found in section 10(b), and in section 14(a) of the 1934 Act, dealing with the solicitation of proxies. Such a directive does not expand the scope of a statute nor alter the plain meaning of legislative language.

Significantly, the rules developed pursuant to this mandate do not deal at all with the substantive areas traditionally governed by state law. Rather, to the extent that they go beyond disclosure, they deal with timing and procedural protections designed to insure that the disclosure mandated by the Act can function. *See, e.g.*, 17 C.F.R. § 240.14e-1 (prescribing procedures governing the timing of offers, the timing of increases in the offering price and the timing of purchases or extensions), 17 C.F.R. § 240.14e-2 (regulating the timing of certain target company statements), and 17 C.F.R. § 240.14e-3 (proscribing the classically fraudulent behavior of trading on

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[37] *See supra* n.2. *See also, e.g.*, two other cases cited in Petitioner's brief, *United States v. Brown*, 79 F.2d 321 (2d Cir.), *cert. denied*, 296 U.S. 650 (1935) (bribing brokers to recommend the purchase of stock, so that investors falsely believed that they were receiving advice untainted by personal interest); *Harris v. United States*, 48 F.2d 771 (9th Cir. 1931) (sending false reports of sales of stock to exchanges so as to create false picture of market activity). In these cases, the misleading of investors was central to the fraudulent scheme.

the basis of inside information). These rules reflect the legislative mandate for, as the court of appeals said in *Buffalo Forge*, "Congress's concern was more with the procedural provisions of the Act than with the substantive terms of takeover bids." 717 F.2d at 760.

The comparison with the regulation of proxy contests is an instructive one, since, as we have seen, the Williams Act amendments came about because tender offers had come to rival proxy contests as the mechanism for seeking corporate control.[38] In proxy contests, as with tender offers, federal law mandates and regulates disclosures, and rules formulated by the SEC pursuant to statutory authority regulate certain timing and procedural elements, while state law continues to function in traditional areas of corporate governance.[39]

Indeed, the SEC is explicit that the purpose of its implementing rules under section 14(a) is only to regulate disclosure, and that the Commission "has no authority to pass upon the fairness or the merits or demerits of any such plan; nor to interfere in the consummation of any such plan where full and complete disclosure has been made." Securities Exchange Act Release No. 34-1350, Fed. Sec. L. Rep. (CCH) ¶ 24,083 at 17,611 (August 13, 1937).

In *Golub v. PPD Corp.*, 576 F.2d 759 (8th Cir. 1978), the question was whether a cause of action was stated under section 14(a) after full factual disclosure had been made in the proxy statement. In affirming the district court's grant of summary judgment in favor of the defendant, the court of appeals stated:

> Section 10(b) and Rule 10b-5 and § 14(a) and (e) and Rule 14a-9 are obviously aimed at the same general evils

[38] As Senator Williams stated, the amendments were intended "to provide the same kind of disclosure requirements" as then existed for proxy contests, and were "patterned on the present law and regulations which govern proxy contests." 113 Cong. Rec. at 24665.

[39] *See, e.g., Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906 (Del. Ch. 1980) (enjoining management from amending bylaws to thwart dissident shareholder's intended proxy contest); *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. Sup. 1971) (enjoining management from advancing date of shareholders' meeting to thwart dissident shareholders who were undertaking a proxy contest).

> in the field of corporate ownership, management and finance, are in *pari materia* and should be similarly construed.
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> [I]t was not the purpose of the federal securities laws to provide a federal cause of action for stockholders who have been damaged by mere corporate mismanagement or breach of fiduciary duty by those in charge of the affairs of the corporation. *Controversies in those areas have traditionally been the subject of litigation in the state courts, and federal legislation in the field of securities regulation was not designed to draw such controversies into the federal courts* . . . .

Id. at 764 (emphasis added).

These principles are equally applicable here. Whether viewed from the perspective of legislative history, precedent, the plain meaning of the statutory language, the SEC's interpretive rules, or the overall statutory scheme of the 1934 Act, Petitioner's expansive interpretation of section 14(e) must be rejected.

E. State law has traditionally governed the conduct involved in this case.

Petitioner argues that a federal cause of action must be created because state remedies are "inappropriate, inconsistent and Constitutionally defective." PB 14. This argument, in the first instance, ignores Justice Brennan's observation in *Cort v. Ash*, 422 U.S. 66 (1974), that

> [c]orporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

Id. at 84.

It is difficult to conceive of an area that is more "traditionally relegated to state law" than breach of contract claims.

Cort, 422 U.S. at 78. Congress may ultimately choose to regulate all contractual claims relating to tender offers, although this seems most unlikely. But any such regulation should not be done by "judicial extension" of antifraud statutes "to 'cover the corporate universe.'" *Santa Fe*, 430 U.S. at 480 (citation omitted).

In fact, state law has traditionally functioned, and functioned effectively, when the courts have found violations of corporate-law principles in the context of tender offers and other contests for corporate control.[40] *See, e.g., Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255 (2d Cir. 1984) (voting of stock issued by target company as part of defensive strategy during a takeover struggle held to breach New York common law fiduciary principles); *Gearhart Industries Inc. v. Smith International, Inc.*, 741 F.2d 707 (5th Cir. 1984) (remanding for determination of whether acquisition made by target in the face of a hostile tender offer violated state law fiduciary duty and fairness requirements); *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 701 F.2d 1000 (1st Cir. 1983) (invalidating target company bylaw that precluded any person from owning more than 9.8% of its outstanding shares as inconsistent with corporation's governing charter); *Klaus v. Hi-Shear Corp.*, 528 F.2d 225 (9th Cir. 1975) (finding violation by target management of fiduciary duty by establishing employees stock option plan and donating substantial stock to it for purposes of diluting strength of offeror's holding); *Podesta v. Calumet Industries, Inc.*, 1978 Fed. Sec. L. Rep. ¶96,433 (N.D. Ill. 1978) (enjoining voting of shares issued by target to resist takeover, in breach of Delaware common law fiduciary principles, by diluting the voting strength of incumbent management's opponents for corporate control); *Consolidated Amusement Co., Ltd. v. Rugoff*, 1978

[40] Despite Petitioner's contention, there need not be, and are not usually, "multiple law suits in various states throughout the nation" to enforce these state-law principles. PB 51. Nor need one deal with the differing laws of each state, as Petitioner suggests. PB 51-52. The law of the corporation's state of incorporation governs its internal affairs, including matters of directors' obligations, breach of fiduciary duty, and self-dealing, and has traditionally provided more than adequate remedies for such conduct.

Fed. Sec. L. Rep. ¶96,584 (S.D.N.Y. 1978) (ordering corporation to repurchase securities sold at an inadequate price in violation of New York common law fiduciary principles); *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204 (8th Cir. 1976) (holding directors' self-issuance of treasury shares to be breach of Minnesota common law fiduciary principles in the context of contest for corporate control); *Gimbel v. Signal Companies, Inc.*, 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del Sup. 1974) (enjoining sale of stock in wholly owned subsidiary for an insufficient price in context of battle for corporate control); *Condec Corporation v. Lunkenheimer Co.*, 230 A.2d 769 (Del. Ch. 1967) (ordering cancellation of shares issued in breach of directors' fiduciary duty to prevent a particular group from obtaining corporate control).

In short, state law has operated precisely in the areas in which it is supposed to operate, and is, in fact, operating in the case at bar, where the Delaware Court of Chancery is determining shareholders' claims of breach of contract and violation of fiduciary duties arising out of this transaction under appropriate state-law principles.[41] There is no reason to believe that creation of parallel federal breach of contract or fiduciary-law principles would prove any more efficacious, or provide any greater consistency. Rather, it could lead only to waste of judicial resources, proliferation of burdens on the participants in tender offers, and the risk of inconsistent results inherent in the consideration by two judicial systems of the identical conduct.

Certainly, the standards that have been suggested to govern the new federal cause of action proposed by Petitioner

[41] As noted (*supra* n. 3), the Delaware court has granted Burlington summary judgment on the claim that it had breached the tender offer contract. However, it denied summary judgment on the claim that Burlington had participated with El Paso directors in a breach of these directors' fiduciary duties, so that this claim will presumably go to trial. It is noteworthy, in this regard, that we do not have the multiple lawsuits in various states that petitioner warns against, but rather one action in Delaware that should resolve all of the substantive questions at issue. No case has been brought in any other state. As petitioner says, "Delaware will now assert jurisdiction and the result of any decision therein would be *res judicata* across the country." PB 56.

would bring no new clarity to the field, and offer no workable guidelines for distinguishing permissible from prohibited conduct. Petitioner's proposed test, for example, suggests that no conduct which impacts in any way on shareholders' opportunity to consider a tender offer should be permitted.[42] *See, e.g.*, PB 47 ("whether or not the act improperly interfered with the choices available to the target company shareholders, including the freely functioning marketplace"). Under this definition, a merger agreement with a white knight on terms which directors reasonably believe to be more favorable than the tender offer would be forbidden; even negotiations seeking alternative transactions might be interdicted.

Other suggested tests are no more helpful. *See, e.g.*, Junewicz, *The Appropriate Limits of Section 14(e) of the Securities Exchange Act of 1934*, 62 Tex. L. Rev. 1171, 1201 (1984) ("[t]he insidiousness of the wrongdoer's purpose differentiates fraud from simple breaches of fiduciary duty, which are actionable primarily under state law"); *Mobil*, 669 F.2d at 374 ("manipulation is an affecting of the market for, or price of, securities by *artificial* means," emphasis by the court);[43] *Data Probe Acquisition Corp. v. Datatab, Inc.*, 568 F. Supp. 1538, 1559 (S.D.N.Y.), *rev'd*, 722 F.2d 1 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1326 (1984) (manipulation is "restricted to those acts that unduly obstruct the exercise of informed shareholder choice").[44]

Tests of this nature add nothing of substance to the applicable state-law principles and are an open invitation to

[42] See Easterbrook & Fischel, *The Proper Role of A Target's Management In Responding To A Tender Offer*, 94 Harv. L. Rev. 1161 (1981).

[43] As the court of appeals observed in the present case, the test suggested in *Mobil* "would transform all decisions by bidders or by target management that affect a tender offer contest into 'artificial' influences." JA 57.

[44] The district court in *Data Probe* allowed that this test might be "difficult . . . to apply in the real world," but concluded that unless the Williams Act were so extended, shareholder rights would be "possibly rendered meaningless because of lax state standards or procedures." 568 F. Supp. at 1559. We submit that this Court should not assume that state standards or procedures will be "lax," nor have they been shown to be so.

judicial legislation.[45] They will not aid, in practice, in assuring that shareholders have the opportunity to consider tender offers, and are likely to deter offers because of the additional uncertainty they would create. Justice White in *Santa Fe* warned against just this kind of interference with state corporate law, and spoke of the impossibility of drawing any rational lines once federal law, unguided by congressionally established standards, entered the state domain. 430 U.S. at 479. This admonition has singular force here.

Petitioner's supposedly *MITE*-based[46] claim that traditional state regulation of corporate conduct is somehow constitutionally precluded merits only brief consideration. In *MITE*, this Court struck down the Illinois Takeover Statute because it imposed burdens on tender offers which conflicted directly with the Williams Act and its rules. 457 U.S. at 640. But state court adjudication of traditional corporate-law or contract claims is not tender offer regulation, and creates no burdens on tender offers, nor is there anything remotely inconsistent between these state-law principles and any provisions of the Williams Act. Indeed, to the extent that petitioner would deny offerors ordinary state-law freedom of contract, this would ultimately conflict with the policy, articulated in *MITE*, of encouraging tender offers to be made.

The type of sharp conflict necessary to displace state law in the area of corporate governance is demonstrated by *Burks v. Lasker*, 441 U.S. 471 (1979). That case involved the Investment Company and Investment Advisors Acts of 1940, statutes establishing a far more pervasive federal regulatory scheme than the Williams Act. The Court nonetheless held that state law, and not federal law, governed the important question of when a corporation's directors could terminate a derivative suit under these statutes. Corporation law, said Justice Brennan, was not an area where the federal courts were authorized "to fashion a complete body of federal law." 441 U.S. at 477.

[45] *See generally* Prentice, *Target Board Abuse of Defensive Tactics: Can Federal Law Be Mobilized To Overcome The Business Judgment Rule?*, 3 J. Corp. L. 337, 356 (1983), noting that the test suggested in *Mobil* "funnels the inquiry right back" to the applicable state law standards.

[46] *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

Rather, "it is state law which is the font of corporate directors' powers." *Id.* at 478. Moreover, "Congress has never indicated that the entire corpus of state corporation law is to be replaced" even when the cause of action is based upon a federal statute. *Id.* While " 'specific aberrant or hostile state rules' " will not be applied, federal courts are not "to fashion an entire body of federal corporate law out of whole cloth." *Id.* at 479, 480.

Petitioner in the present case makes no effort to show the kind of inconsistency required by *Burks*, or any inconsistency at all, between state contract law and the Williams Act. Instead, she maintains, without citation to Congress or court, that the "purpose of the Williams Act was to ensure uniform treatment and a rapid resolution of all tender offer disputes." PB 53. Congress is free, of course, to establish such a regulatory scheme when it considers the mass of materials before it with respect to proposed legislative changes in the Williams Act, although we seriously doubt that a federal law of tender offer contracts will be part of any program it may choose to adopt. But that no such regulation presently exists is beyond any possible dispute.

POINT III

THERE ARE NO POLICY REASONS TO CREATE THE CAUSE OF ACTION SUGGESTED BY PETITIONER

In order to create the cause of action sought by petitioner, the Court would, in the first instance, have to overturn the principles which it has continually articulated in recent securities cases. It would have to define and interpret language (*i.e.*, fraudulent and manipulative) in ways it has never been interpreted under the securities laws. It would have to intrude deeply into "established state policies of corporate regulation," causing inevitable conflict and friction. *Santa Fe*, 430 U.S. at 479. And it would have to impute an intent to Congress which hardly can be gleaned, even in fragments, from the volumes of legislative materials relevant to the Williams Act.

There is presently much debate in the scholarly, legal, business and regulatory communities as to the effect of tender

offers on our economy, the appropriate role of target company management in responding to them, and the desirability of various reforms which might substantially alter the tender offer process. Some commentators believe that tender offers are harmful to the country's long-term economic interests, since they divert corporate and financial resources from more productive pursuits. Others believe that tender offers operate to check inefficient management and promote synergistic savings, and that target company managements have been improperly permitted to obstruct them, often for their own personal ends. The views expressed and the suggestions made by professors, businessmen, economists, lawyers and regulators, and the literally reams of material written on the subject, cover the spectrum between these poles.[47] There is, for certain, no conceivable consensus as to what practices should be encouraged, and which conduct should be curtailed.

All of this is now before the appropriate congressional committees, along with various detailed legislative proposals for the amendment of the Williams Act, and Congress will soon have some difficult choices to make. But this is the nature of the legislative function, and the process will hardly be aided by judicially replacing state causes of action with a federal one, particularly where Congress has provided no guidelines or standards to chart the way. Congress may opt for wide-ranging federal regulation; it may choose to prohibit some tactics that are used in tender offers and to allow others; or it may choose to leave things pretty much as they are. But the choice is for it, and not the courts, to make.

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[47] For example, the report of recommendations of the SEC Advisory Committee on Tender Offers, which includes differing views of various members of the Committee, alone runs to over 170 pages. Scholarly comment in the area is seemingly inexhaustible and to catalogue it would, we believe, serve no productive purpose. The secondary materials thought pertinent by the court of appeals in the present case are set forth at JA 57.

POINT IV

UNDER ANY DEFINITION OF CONDUCT PROSCRIBED BY SECTION 14(e) RESPONDENTS' CONDUCT WAS LAWFUL

Even if a more expansive definition of section 14(e) were adopted, it could not possibly cover the conduct at issue here. The claim here is for the "wrongful termination" of a tender offer (PB 5) — a supposed violation of the tender offer contract — and no court under any definition has held that breach of contract constitutes "fraud" or "manipulation."

Indeed, the facts alleged here could not possibly come within the reasoning of *Mobil*, the only case that has departed from the requirement of deception under the antifraud provisions of the federal securities laws. There was no attempt to affect the market or price of securities by artificial means or by any means whatever. There was no attempt to alter any "delicate balance between target company management and the bidder" (PB 12); the complaint, rather, is of a fully-disclosed *agreement* between target and bidder, which is how most acquisitions occur and many hostile tender offers are ultimately resolved. There was no "crown jewel" asset option to render the target company virtually useless to any hostile bidder; any other bidder for El Paso would have found the company's assets intact. The stock option involved was at the tender offer price, not at a substantially lower price, as in *Mobil*, and was for only a small portion of the target shares.[48]

Moreover, the termination of the initial offer had nothing to do with the bidding process for El Paso stock, nor did it operate to defeat any competing bidder since no competitive offer had emerged. Indeed, the agreement can be said to have facilitated competitive bidding for El Paso, since it provided an additional 20 business days — the Williams Act time period for the new offer — in which a competing bid could have been made. All that happened is that Burlington and El Paso

[48] Compare *Data Probe*, where a 200% stock option made it impossible for a hostile offeror to prevail. Even the district court in *Data Probe*, which had found this conduct to be manipulative, opined that options of the dimension involved in the present case should be permitted as "consistent with Williams Act objectives." 568 F. Supp. at 1560. The court noted that the SEC Advisory Committee had "recommended with virtual unanimity" that companies be permitted to offer such options in tender offer contests. *Id.* at 1561.

compromised their differences after arm's-length negotiations by a typical acquisition agreement providing substantial benefits to all El Paso shareholders — including important protections against any subsequent merger at an inadequate price — and which ultimately resulted in the acquisition of all El Paso shares at premium prices.[49]

This ordinary corporate activity is not "fraud" by any standard, and no court or commentator has remotely suggested that it is. There is, we submit, no warrant for judicially extending section 14(e) beyond what has generally been considered to be the boundaries of the federal securities laws. But if it is to be extended, a breach of contract claim is, to borrow Justice Rehnquist's phrase in *Blue Chip*, a most unlikely candidate for any such expansion. 421 U.S. at 751. We respectfully submit that the decisions of the court of appeals and the district court were clearly correct in this case and that the judgment should be affirmed.[50]

[49] The portion of petitioner's stock that was purchased in the tender offer was reduced by proration because, as noted at p. 5, *supra*, the agreement gave all El Paso shareholders, including the holders of the 25,000,000 shares who had not tendered their shares in the initial offer at management's urging, an opportunity to tender. Not to have given all El Paso's shareholders the opportunity to tender pursuant to the new offer, after the market had established that the consideration in the first offer was fair, might, itself, have constituted a breach of fiduciary obligations.

Ultimately, Burlington acquired, in a merger, all remaining shares for a consideration having the same value as the tender offer price.

[50] The courts below also properly dismissed petitioner's "disclosure" claim. Petitioner alleges that Burlington should have disclosed, in its January offer, employment contracts that El Paso had entered into with certain of its officers. However, there is indisputably no causal nexus between petitioner's claimed damage—allegedly caused by the termination of the December offer—and any failure to disclose in the later, January offer. Petitioner's claim is not that she was induced by misrepresentations or omissions to tender her shares into the January offer, but rather that, because of proration, not all of her shares were purchased in that offer. Moreover, there is no requirement that Burlington disclose the El Paso employment contracts. It is undisputed that El Paso did in fact disclose these contracts in its Schedule 14D-9 filed with the SEC (and mailed to El Paso shareholders) on December 23, 1982. JA 192-216. That public filing resulted in a Wall Street Journal article concerning the contracts on December 30, 1982. JA 223-226. Thus, the material which Petitioner claims was hidden from the El Paso shareholders in the January offer was public knowledge 12 days before the offer was made.

CONCLUSION

For the above-stated reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

A-1

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

PETER GILBERT and WILLIAM STEINER,
Plaintiffs,

v.

THE EL PASO COMPANY and
BURLINGTON NORTHERN, INC., et al.,
Defendants.

HERBERT BREITMAN, as sole Trustee of ED ROSENTHAL NECKWEAR, INC. PROFIT SHARING PLAN, and all other parties similarly situated and circumstanced,
Plaintiff,

v.

BURLINGTON NORTHERN, INC., et al.,
Defendants.

Consolidated Civil Action Numbers 7075 and 7079

Civil Action Number 7078

SUBMITTED: October 17, 1984
DECIDED: November 27, 1984

Defendant Burlington's Motion for Summary Judgment. Granted in Part. Denied in Part.

William Prickett, Esquire of Prickett, Jones, Elliott, Kristol and Schnee, Wilmington, Delaware; Abraham G. Levin, Esquire and Martin A. Coleman, Esquire of Rubin Baum Levin Constant & Friedman, New York, New York; Mordecai Rosenfeld, Esquire of New York, New York, Attorneys for Plaintiffs.

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WALSH, Vice Chancellor

This is a class action arising out of Burlington Northern Inc.'s ("Burlington") takeover of the El Paso Company ("El Paso") in early 1983. The plaintiffs are those shareholders who tendered into Burlington's December 21, 1982, tender offer, which Burlington later terminated, and subsequently were subject to proration in the second tender offer made in January, 1983. Plaintiffs' complaint contains a number of allegations against El Paso and Burlington[1] concerning the termination of the first tender offer and the terms of the second tender offer. It is alleged that both corporate defendants and their respective directors manipulated the corporate machinery for entrenchment purposes, conspired to breach fiduciary duties and interfered with business relationships. Burlington is separately charged with breach of contract and equitable estoppel.

Burlington has moved to dismiss the complaint, or alternatively, for summary judgment on all counts asserting that (1) it owed no fiduciary duty to the El Paso shareholders, (2) it had an unqualified right to terminate the December tender offer upon the occurrence of events specified in that tender offer, and (3) it could not be held liable for conspiracy merely because it conducted arm's-length negotiations with El Paso management to obtain the lowest available price for El Paso stock.

In the context of a motion to dismiss, or for summary judgment, Burlington must demonstrate that the plaintiffs could not prevail under any state of facts which could be proved in

[1] There are two Burlington defendants: Burlington Northern, Inc. and its subsidiary, R-H Holdings Corporation, apparently organized for the purpose of effecting the El Paso takeover. For present purposes, there is no basis to distinguish between them and they will be referred to collectively as "Burlington."

support of their claim. *Penn Mart Realty Company v. Becker*, Del. Ch., 298 A.2d 349 (1972), or that no material question of fact exists and that Burlington is entitled to relief as a matter of law. In addition, all factual inferences must be resolved in favor of the plaintiffs as the nonmovants. *Judah v. Delaware Trust Co.*, Del. Supr., 378 A.2d 624, 632 (1977). So viewed, the following factual pattern emerges. On December 21, 1982, Burlington made a tender offer for 25,100,000, or 51% of the shares of El Paso at $24 a share, a 25% premium above market value. The stated terms of the offer provided for withdrawal of the tendered shares through January 12, 1983, and included a number of conditions, the occurrence of which, at Burlington's option, might terminate its obligation to purchase the tendered shares. These conditions, or "outs," included (1) litigation challenging the tender offer, (2) a change, or proposed change, in the business, assets, or properties of El Paso, (3) the issuance of, or a proposal to issue, additional shares of El Paso stock, (4) the adoption of, or a proposal to adopt, any amendment to El Paso's charter or bylaws, and (5) a definitive agreement for a merger or other business combination between El Paso and Burlington.

The conditions engrafted on Burlington's offer anticipated the type of defensive activities a target company often takes in opposing a hostile takeover. Thus, it is not surprising that each of these conditions actually occurred in the three weeks following Burlington's initial tender offer. The El Paso board of directors responded aggressively to Burlington's announcement. It advised its shareholders that the $24 dollar offering price was inadequate and initiated actions to discourage Burlington's overture, including litigation challenging the offer; the announcement of plans to issue a preferred stock dividend; proposed bylaw amendments and negotiations to sell certain of its assets. In addition, the Attorney General of Texas, apparently at the urging of El Paso, sought to enjoin the offer on antitrust grounds. These measures failed to stem the interest of El Paso's shareholders who by January 10, 1983, had tendered 25,433,166 shares in complete satisfaction of the tender offer.

On January 12, the tendering shareholders no longer would have been able to withdraw their shares, and Burlington would have been able to purchase those shares and gain control of El Paso.

In the meanwhile, however, the hostile takeover turned friendly as the El Paso Board reached an agreement with Burlington. On January 10, 1983, the former antagonists announced the terms of an agreement under which (1) Burlington agreed to revoke the December tender offer, (2) Burlington would commence a new tender offer for 21 million shares of El Paso common, with El Paso itself selling Burlington the additional 4,166,667 shares needed to achieve control, and (3) certain El Paso directors were granted "golden parachutes," *i.e.*, employment benefits, in the event of a takeover. Because the revised offer permitted El Paso and certain of its directors to sell their shares directly to Burlington, it had the effect of denying certain shareholders the opportunity to participate in the second tender offer, which was oversubscribed with more than 40 million shares tendered. Thus, although the offering price of $24 per share remained unchanged, plaintiffs and the class members were unable to realize the premium for all the shares already deposited under the first tender offer.

Even though Burlington eventually acquired all outstanding shares of El Paso in a second stage offer at a later date and at the same $24 price, the January tender offer contained no requirement concerning the time of purchase or price of shares to be acquired in the second tier. Prior to that time, the plaintiff class claims to have sold their shares on the open market at a substantial discount under the tender offer price.

Burlington's motion for summary judgment, while conceding plaintiffs' view of the record, questions the legal validity of the alternative grounds for recovery. In essence, it contends that as a tender offeror, pursuing its own economic interests, it owed the plaintiff class no contractual or fiduciary duty. To the extent that its role as an offeror is subject to federal law requirements of disclosure and non-manipulation Burlington rests upon a determination in companion federal litigation

which absolved it of federal securities law violations *vis-a-vis* the plaintiff class.[2] It is therefore necessary to test separately the merit of plaintiffs' claims arising under State law.

I

Plaintiffs' primary grievance is that Burlington breached its contractual obligation to complete its December tender offer. The parties agree that New Jersey law controls this question because the depository arrangement under which shares were to be tendered took place in that State. There are, however, no unique provisions of New Jersey statutory or decisional law which suggest a result at variance with general considerations of contract law.

A tender offer results in formation of a contract where it invites acceptance through the performance of a specific act, rather than through an exchange of promises. 1 Williston, Contracts §§ 31, 76 (3d ed. 1957); 1 Corbin Contracts § 62; Restatement of Contracts (Second) § 30. The specific response sought through a tender offer to purchase securities at a stipulated price is the deposit of shares into the depository during a designated period of time. But the offeror is "master of his offer" and may attach conditions which limit his obligation in full or in part. *Kroeze v. Chloride Group Ltd*, 5th Cir., 572 F.2d 1099, 1105 (1975); *Lowenschuss v. Kane*, 2d Cir., 520 F.2d 255 (1975). Where the specified condition is a condition subsequent, it serves to relieve the offeror of the obligation to proceed upon the happening of a future event, even in the face of an act of acceptance, if the condition subsequent occurs within the time reserved.

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[2] In *Schreiber v. Burlington Northern, Inc.*, D. Del., 568 F. Supp. 197 (1983); *aff'd.* 3a Cir., 731 F.2d 163 (1984), Chief Judge Latchum determined that the conduct of Burlington and El Paso in structuring the terms of the January tender offer did not constitute manipulation or actionable nondisclosure within the meaning of § 14(e) of the Williams Act (15 U.S.C. § 78n(e)). In the absence of underlying federal jurisdiction, the Court declined to rule upon the pendant state claims which mirror the claims in this case.

Plaintiffs acknowledge that many, if not all of the "conditions out" specified in Burlington's December tender offer occurred. Litigation both in Delaware and in Texas was in progress when the December offer was terminated and El Paso's efforts to amend its bylaws and sell certain of its assets are not disputed. Plaintiffs rely, however, on Burlington's alleged failure to exercise its option to terminate the tender offer in good faith. Implicit in every contractual relationship, it is argued, is the obligation of a party who seeks to invoke a condition relieving that party of proceeding with an undertaking to do so with honesty and fair dealing, particularly where the opposing party has acted in reliance upon the outstanding posture of the offer. In effect, plaintiffs seek to impose a test of subjective good faith rather than the objective search for the occurrence of specified conditions.

An implied covenant of good faith and fair dealings is engrafted upon every contract. 5 Williston, Contracts § 670 (3rd Ed. 1969); *Onderdank v. Presbyterian Homes of N.J.*, N.J. Supr., 425 A.2d 1057, 1062-63 (1981). This requirement extends to the enforcement of conditions and may preclude a party from avoidance of a contractual undertaking through invoking a condition which occurred by reason of his own actions. *Association Group Life, Inc. v. Catholic War Veterans*, N.J. Supr., 293 A.2d 382, 384 (1972). Similarly, if one party is given discretion in determining whether the condition in fact has occurred that party must use good faith in making that determination.

While the result of Burlington's termination of its December tender offer might appear unfair to those shareholders who tendered their shares in response to the announcement, it cannot be said that they were misled concerning Burlington's right to do so. The offer expressly provided that Burlington "shall not be required to accept for payment or pay for tendered Shares, or may terminate or amend the Offer" if any of the specified conditions occur, and Burlington, in its "sole judgment," decides that proceeding with the tender offer is "inadvisable." This language place tendering shareholders on

clear notice that upon the occurrence of any condition, Burlington reserved for itself the choice of proceeding with the tender offer or invoking the condition and terminating the offer.

The application of a good faith or subjective standard to the enforcement of conditions is appropriate where either the definition or the declaration of occurrence of the condition is left to the sole discretion of the invoking party. *Onderdank, supra.* Where, as here, the conditions are expressed, the motivation of the invoking party is, in the absence of fraud, of little relevance. Certainly, a party to a contractual undertaking is free to pursue its economic interests through the application of conditions intended to limit the cost of proceeding. Thus, even if Burlington's real motivation was, as plaintiffs urge, to secure a definitive agreement of merger, on terms more beneficial to it, as an alternative to its December tender offer, the tender offer expressly so contemplated. Although the terms of that later agreement may be subject to question, as noted hereafter, Burlington's right to pursue that course does not infringe upon plaintiffs' contractual rights under the tender offer.

II

Next to be considered is plaintiffs' claim of breach of fiduciary duty. Although Burlington owned only 1% of El Paso's shares when it commenced its takeover efforts, plaintiffs maintain that once Burlington achieved the initial goal of its December tender offer, that is, once it became aware that there were sufficient shares in the depository to constitute control, it wore the mantle of fiduciary responsibility. Plaintiffs argue that Burlington used "the power to control El Paso" in fashioning a friendly agreement with El Paso's management, a consequence of which was the squeezing out of the plaintiff class from the second tender offer. In any event, it is argued, there are material issues of fact which preclude a determination of fiduciary obligation.

Generally, a shareholder who owns less than 50% of a corporation's outstanding stock does not, without more, become a controlling shareholder of that corporation, with a con-

comitant fiduciary status. *Osofsky v. J. Ray McDermott & Co., Inc.*, 2d Cir., 725 F.2d 1057 (1984). For controlling stock ownership to exist in the absence of a numerical majority there must be domination by a minority shareholder through actual exercise of direction over corporate conduct. *Kaplan v. Centex Corporation*, Del. Ch., 284 A.2d 119 (1971).

As the party resisting summary judgment plaintiffs are entitled to the inference that Burlington, by virtue of its depository achievement, assumed a superior bargaining position in dealing with El Paso's management. To that extent it may be said that Burlington used its *right* to future control as leverage to fashion a merger agreement more to its benefit. But its status, however enhanced, remained that of an outsider, free to bargain but not to dictate terms to El Paso's management. Burlington's lack of actual control is illustrated by its frustration in attempting to block El Paso's attempt to sell certain of its assets, the so-called "crown jewels." Not only was Burlington unsuccessful in blocking El Paso's efforts to solicit offers for these assets, but also El Paso refused to permit Burlington to participate in the bidding for them.

Plaintiffs' contention that Burlington occupied a fiduciary role because of its potential for control is subject to the same infirmity as its contract argument. Because of the conditional nature of the tender offer, no fixed legal relationship arose as long as Burlington was entitled to withdraw its tender offer. While, as previously noted, certain claims, actionable under federal securities law, may arise from the manner and method of a tender offer, Burlington has been absolved of misconduct in that respect. State law claims of breach of contract and breach of fiduciary relationship must subsist on the actuality of a specific legal relationship, not in its potential.

In sum, I conclude that Burlington, as a hostile tender offeror, not exercising actual control over the corporate affairs of its target, El Paso, owed no direct duty of a fiduciary nature to El Paso's shareholders.

III

I turn now to the crucial and dispositive issue—the conspiracy claim. Plaintiffs contend that, even in the absence of a direct fiduciary obligation, Burlington used its potential for control to extract from Burlington conditions more favorable to it than the December tender offer and in the process caused El Paso's directors to breach their fiduciary duty to El Paso's shareholders, including plaintiffs. The focus thus shifts to El Paso's conduct during the period between the depository achievement and the announcement of the merger agreement. It is plaintiffs' position that if El Paso's directors, in the face of inevitable defeat, abandoned their resistance in order to fashion a better deal for themselves at the expense of certain of its shareholders who had already tendered into the December offer, such conduct would constitute a breach of fiduciary duty. And, the argument runs, if Burlington was a party to the agreement it may share liability under the theory of civil conspiracy.

Although the record is silent on the events which preceded Burlington's January 10, announcement that it had reached an amicable agreement with El Paso's management, at least two scenarios, both favorable to plaintiffs, may be inferred. Under the first it may be assumed that Burlington, when it became aware that sufficient shares had been tendered into the depository to constitute control, approached El Paso's management, suggested the inevitable result and proceeded to dictate terms of a friendly takeover. These terms which included the termination of all litigation, the cessation of efforts to sell assets and the retention of the charter and the bylaw structure were achieved without increasing the December tender offer price. Burlington presumably was aware that certain terms requested by El Paso's management, the sale of treasury shares and the opportunity for directors to tender into the revised offer, would result in certain of El Paso's own shareholders being squeezed out of the second offer. The other chain of events portrays El Paso's management initiating takeover discussions after it became aware that Burlington had achieved the potential for control through its depository. Because of Burlington's superior

bargaining position the result is the same and the detriment to plaintiffs equally evident.

Plaintiffs contend that regardless of which of the defendants initiated the discussions which led to the friendly tender offer, Burlington's participation, with presumed knowledge of El Paso's fiduciary duty to protect the interests of its shareholders, and its agreement to terms which, *inter alia*, narrowed the pool of shares which could be tendered into the second offer, constituted civil conspiracy. Burlington replies that because its primary obligation is to its own shareholders, its effort to obtain the best price through negotiations with El Paso was in furtherance of its own corporate responsibility.

It is well settled that a third party who knowingly participates in the breach of a fiduciary's duty becomes liable to the beneficiaries of the trust relationship. *Jackson v. Smith*, 254 U.S. 586, 589 (1921); *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, Del. Supr., 372 A.2d 168, 170 (1976); *Penn Mart Realty Company v. Becker*, Del. Ch., 298 A.2d 349, 351 (1972); *Scott on Trusts*, § 326.5 (3rd Ed. 1967). In *Penn Mart*, this Court set forth the three elements which must be asserted in support of a claim of civil conspiracy: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty and (3) knowing participation in that breach by the party not in direct fiduciary relationship. A fourth element, the allegation of damages resulting from the action of the conspiracy parties, also is required. *Weinberger v. UOP, Inc.*, Del. Ch., 426 A.2d 1333, 1348 (1981), *rev'd on other grounds*, Del. Supr., 457 A.2d 701 (1983). *Weinberger* notes that while the essence of a criminal conspiracy is the agreement, the essence of civil conspiracy is damages.

While El Paso is not a party to the present motion and has not participated in the briefing, it may be assumed, at this juncture at least, that it owed a fiduciary duty to the plaintiff class not to prejudice their interests in the December tender offer. This does not mean that El Paso's management was not free to attempt to persuade its shareholders not to tender their shares or to engage in other defensive tactics, but El Paso could

not interfere with the alienability of the tendered shares by pursuing its own interests. Since Burlington had already achieved a control level of shares in the December depository, the inclusion in the friendly agreement of a revised tender for fewer shares at the same price because of the direct purchase of shares from El Paso's treasury and from certain of El Paso directors who had not tendered into the December offer hardly advanced the interests of El Paso's shareholders, particularly those who had already tendered their shares into the December offer. But the agreement which led to the January tender offer accommodated Burlington by permitting it to purchase 4,166,667 newly issued shares of El Paso stock directly from El Paso. The $100 million resulting payment by Burlington to El Paso would, of course, redound to its benefit once control was secured. Because the purchase of the treasury shares was clearly to its own benefit, it is arguable whether Burlington may be said to have conspired with El Paso to acquire them. But because this valuable concession, which greatly impacted upon El Paso's shareholders who had already tendered their shares; was extracted in exchange for other terms which clearly benefitted only El Paso's management and not its shareholders, it cannot be said, as a matter of law, that Burlington was merely engaged in arm's-length negotiations. Clearly, the purchase of approximately 556,000 shares from El Paso's directors, who had disdained tendering into the December offer, falls within the ambit of a claim of civil conspiracy. By agreeing to purchase them from El Paso's directors, Burlington is chargeable with knowledge that El Paso's directors were preferring their interests to certain of its shareholders who had already tendered. In effect, Burlington in permitting displacement of shares already tendered with shares to be tendered by El Paso's directors became a party to subjecting certain of El Paso's shareholders to extensive proration. To the extent those shareholders suffered damages, an issue not contested by Burlington in the context of its motion for summary judgment, the elements of a civil conspiracy appear complete.

Burlington attempts to refute the conspiracy claim by reliance upon *Weinberger v. United Financial Corp. of Califor-*

nia, Del. Ch., C.A. 5915, V.C. Hartnett (October 13, 1983), in which this Court refused to impose liability upon an offeror in a tender offer who simply pursued arm's-length negotiations with a target company in an effort to obtain the best price it could. *Weinberger*, however, does not stand for the proposition that pursuit to the best available price in negotiations with opposing management can be undertaken without regard to the target management's fiduciary obligations to its shareholders. In *Weinberger* the Court noted that "no fact has been adduced to indicate that National aided and abetted the United Financial board in any way." Slip at 29. Obviously, an offeror who does participate in a target board's breach of fiduciary duty, cannot be said to be conducting arm's-length negotiations. Furthermore, as indicated in *Penn Mart, supra*, the offeror's fiduciary duty to its own shareholders to obtain the best price for stock purchased, does not necessarily obviate the offeror's duty to refrain from participating in the target management's breach of fiduciary duty. Thus, although an offeror may attempt to obtain the lowest possible price for stock through arm's-length negotiations with the target's board, it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders.

It is clear that Burlington's motion for summary judgment must be denied as to the conspiracy claim. Viewing all inferences in a light most favorable to the plaintiffs, a number of triable issues of fact exist concerning the negotiations which led to the agreement announced on January 10, 1983, and its detrimental effect on the plaintiff class. In short, if El Paso's board breached its fiduciary duty to its shareholders, with Burlington's knowing participation, and damages are shown, then the plaintiffs can prevail.

It should be emphasized, however, that the denial of summary judgment as to the conspiracy claim is based upon Burlington's conduct in fashioning the terms of the January tender offer. Its liability, if any, to plaintiffs does not arise contractually, or through a direct fiduciary relationship, in the

context of the formulation or termination of the December tender offer. This distinction, while subtle, is a necessary one if Burlington's role as an alleged co-conspirator is to remain actionable.

IV

Lastly, the plaintiffs also allege tortious interference with contractual business relations against both El Paso and Burlington. This claim is quickly addressed. Because Burlington was a party to the contract representing the first tender offer, the plaintiffs plainly have no cause of action against Burlington for tortious interference with that contract. *Wilmington Trust Co. v. Clark*, Md. Ct. App., 424 A.2d 744, 754 (1981); *Battista v. Lebanon Trotting Ass'n*, 6th Cir., 538 F.2d 111 (1976). Accordingly, the defendant's motion to dismiss with respect to this count is granted.

V

In summary, Burlington's motion for summary judgment as to Counts I, II, III and VI is granted. The claim of equitable estoppel (Count IV) has not been briefed by plaintiffs and is apparently abandoned. As to the conspiracy claim, Count V, the motion for summary judgment is denied.

No. 83-2129

Office-Supreme Court, U.S.
FILED
JAN 8 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BARBARA R. SCHREIBER,

Petitioner,

— against —

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR., L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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Williston on Contracts (3d ed. 1961 & Supp. 1979) 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

BARBARA R. SCHREIBER,

Petitioner

- against -

BURLINGTON NORTHERN, INC., R-H HOLDINGS CORPORATION, THE EL PASO COMPANY, TRAVIS HUBERT PETTY, WILLIAM V. HOLIK, JR., M.R. ENGLER, JR., W.C. HENDERSON, R.S. MORRIS, M.A. EHRLICK, A.M. DERRICK, RICHARD L. McCONN, D.J. MacIVER, JR. L.M. VAREN KAMP, HOWARD BOYD, WILLARD F. ROCKWELL, JR., W.D. NOEL, L. EMORY KATZENBACH, BEN F. LOVE, KENNETH RUSH, and J.R. HUBBARD

Respondents.

REPLY BRIEF FOR PETITIONER

I.
RESPONDENTS MISSTATE THE FACTUAL RECORD AND SEEK TO OBSCURE THE DISPOSITIVE ISSUES BEFORE THE COURT

The central issue before the Court is whether deception or nondisclosure is, in all cases, an essential element to state

a claim under Section 14(e) of the Williams Act (codified as amended at 15 U.S.C. §78n(e)(1983)). Petitioner has alleged that respondents engaged in a willful and collusive scheme in violation of the §14(e) prohibition against fraudulent or manipulative acts by causing the sale of target company stock and lock-up stock options to the offeror in exchange for the termination of a fully subscribed tender offer, submission of an inferior, revised offer and ratification of golden parachute contracts for target company management. Petitioner has argued that such deliberate misconduct committed for the sole benefit of respondents at the direct expense of target company investors

constitutes a violation of §14(e) even if disclosed.[1]

Respondents seek to evade the issues at bar through repeated misstatement of the factual record,[2] citation of authority taken out of context[3] and

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[1]Throughout this reply brief, petitioner's main brief will be referred to as "PB" and respondents' brief as "RB".

[2]Compare PB 5-12 & JA 3-16 with RB 2-5. Respondents disregard the elementary principle that on a motion to dismiss on the pleadings under F.R.C.P. 12(b)(6), the court must "...take, as true, the material facts alleged..." in the complaint. Hospital Building Co. v. Trustees of the Rex Hospital 425 U.S. 738, 740 (1976).

[3]See, e.g., RB 23 at N. 27. The portion of the sentence omitted by respondents begins "[s]heerly by weight of recent precedent, but not necessarily by force of logic,..." Junewicz, The Appropriate Limits of Section 14(e) of the Securities Exchange Act of 1934, 62 Tex. L. Rev. 1171, 1204 (1984). Respondents misrepresent the same author's position in another article cited in RB 24 at n. 29.

mischaracterization of petitioner's arguments. Despite the misleading statements of respondents, the claims raised by petitioner in the case at bar do not involve only the "wrongful termination of a tender offer" (RB 2), a "simple breach of contract" (RB 9) or a mere "breach of fiduciary duties" (RB 15). To accept respondents' view of the facts would require the Court to artificially isolate each of the transactions at issue as discrete and unrelated events without regard to the fact that each of these acts was interrelated and constituted an integral part of respondents' deliberate scheme to deprive target investors of the benefits of their free and informed choice in the tender of their shares.

Although respondents never answered the complaint, they persist in arguing a distorted view of the record based upon

supposed facts which were never part of the pleadings or considered by the courts below. Respondents state, for example, that the agreement between Burlington/R-H and El Paso management was "...beneficial to...El Paso shareholders." (RB 4), when the complaint clearly states that, it was precisely because of this agreement that target investors sustained losses and respondents profitted. See JA 15. Respondents also state that this agreement allowed "El Paso and its shareholders..." to receive "...needed equity capital." (RB 4) (emphasis added), when the fact is that this agreement served to deprive target investors of "needed equity capital" by permitting the offeror to win control of El Paso (and this "equity capital") without having to pay for the full 25.1 million shares already tendered

by El Paso shareholders. See JA 12-15.[4]

Contrary to respondents' assertion, the case at bar does involve the claims that respondents sought to "...artificially affect the market for El Paso stock" (RB 5) and competing offers were "...thwarted by the agreement"

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[4]Despite the absence of any support in the record, respondents attempt to minimize the significant and substantial damages sustained by target investors by characterizing the consideration paid in the tender offer as a "substantial premium" (RB 2, 5, 23, 41) and the price paid in the second stage of the acquisition as a "consideration equal" (RB 4, 41) to the tender offer price. In truth, the second stage offer was made for $12. net in cash plus one quarter share of Burlington preferred stock in return for each share of El Paso stock, as compared with the $24. net in cash paid for each share of El Paso stock under the terms of the tender offer. Evidence will show that the second stage offer was worth considerably less than the $24 cash offered in the first stage.

(RB 5) between Burlington/R-H and El Paso management. See PB 51, 65, 68. There is nothing in the record to support respondents' self-serving claim that El Paso management only "...bargained for the right to permit all shareholders to consider the only offer than available." RB 5. In fact, the complaint specifically alleges that El Paso management caused the termination of the fully subscribed offer "...to enable a tender of their own shares and was not for the benefit of the public shareholders of El Paso." See JA 14.

The fact that the Burlington/R-H tender offer was the "...only offer then available" is simply the direct and intended result of respondents' collusive scheme. The sale of El Paso stock and lock-up stock option to the bidder served

to deter competitive bids while ensuring that the favored bidder would gain control of the target even though the revised offer sought 4.1 million shares less than were solicited in the prior offer. See PB 65. The foregoing events constitute a continuous, interrelated and integrated chain of misconduct which cannot be isolated or distorted into a mere "breach of fiduciary duties" or "simple breach of contract" claim.

Respondents argue that the stock option agreement should be disregarded by the Court because the option was "...at the tender offer price..." and was for "...only a small portion of the target shares..." (RB 40). Respondents fail to acknowledge that this option gave the bidder effective control over 4.95 million shares of target stock without

actually having to pay the full tender offer price. Respondents also ignore the fact that it is the combination of this lock-up option and the simultaneous outright sale of 4.16 million shares of target stock that foreclosed competitive bidding for El Paso, not one or the other transaction taken alone. Cf. Mobil Corp. v. Marathon Oil Co., 669 F.2d 366 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982). (option sale of single asset, if substantial enough, may be sufficient to violate §14(e)).[5]

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[5]Respondents incorrectly claim that the Sixth Circuit recently "...retreated from Mobil..." (RB 17) in Biechele v. Cedar Point, Inc., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶91,829 (6th Cir Nov. 8, 1984). The Sixth Circuit, in

(Footnote continued on next page)

Respondents incorrectly claim that "[T]here is no factual dispute..." that the conditions contained in the December tender offer "...permitted its termination." (RB 3). In support of this claim, respondents refer the Court to the recent decision of the Delaware Court of Chancery in Gilbert & Steiner v. Burlington Northern, Inc.,[6] where the court granted summary judgment to Burlington/R-H on the state law breach of

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(Footnote continued from previous page) fact, only refused to expand the Mobil rationale to a case involving completely different facts (no lock-up option and the tender offer bid was only for fifteen percent of the target company stock.)

[6]A copy of this decision is appended to respondents' brief (RB at A1 through A13). The Delaware Court denied summary judgment, refusing to dismiss the other state law claim for conspiracy to breach fiduciary duties owed to El Paso shareholders. See RB at A 13.

contract claim. That decision is not binding on this litigation. In the first place, petitioner was not a party to that proceeding and is not bound by the result.[7] Secondly, even if it could be assumed arguendo that such conditions might be invoked in accord with state law, this does not and cannot serve to validate the misconduct at issue here under federal law, and this is particularly true where, as here, petitioner's action was commenced before the Delaware suit.

Lastly, even if this issue was to be considered solely as a matter of state

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[7]In light of respondents' ex parte stipulation to class status in the Delaware Chancery Court action, there are serious questions of collusion between the litigants to deprive the class of their federal constitutional rights of due process, notice and opportunity to be heard. Curiously, respondents do not deny collusion in the Delaware state court action.

law, respondents would be estopped from invoking these conditions to justify the termination of the December offer because the bidder waived any right it might have arguably possessed under state law to invoke these outs when it elected to proceed with the December tender offer despite continuing litigation with El Paso and others. See JA 11. Indeed, Burlington/R-H was on the verge of winning those suits and had publicized its intention to consummate the December offer. It terminated the December offer not because of the lawsuits or the occurrence of any condition, but because it had negotiated "a better deal" with respondents. By its failure to act promptly to invoke its alleged right to terminate the December offer and its deliberate conduct expressing the intent

to proceed with the offer come what may, respondents waived any breach of these conditions and forever relinquished any right to terminate the offer based upon these conditions. See Lichter v. Goss, 232 F.2d 715, 720 (7th Cir. 1956); Saverslak v. Davis-Cleaver Produce Co., 606 F.2d 208, 213 (7th Cir. 1979); 5 Williston on Contracts §691 (3d ed. 1961 & Supp. 1979).[8]

Finally, respondents argue that state law has traditionally functioned "...effectively..." (RB 34) in the context of tender offer disputes and that the one pending state court action

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[8]The estoppel issue was not briefed by the parties or passed upon by the Delaware Court since the estoppel claim was abandoned in that suit. See RB at A 13.

"...should resolve all of the substantive questions at issue." (RB 35 at n. 41).

In the first place, it is clear that no state court has, or claims to have, subject matter jurisdiction to adjudicate the federal securities laws violations at bar. Secondly, the transactions at bar have been the subject of three separate state court lawsuits filed thus far,[9] and more could be expected to be filed before the applicable statute of limitations constitutes a bar. No doubt

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[9]Respondents cite three cases involving state law claims: Gilbert & Steiner v. Burlington Northern, Inc. (copy appended to respondents' brief at A 1); Gelobter v. Petty (cited in RB 18 at n. 23); and Smachlo v. Birkelo, 576 F. Supp. 1439 (D. Del. 1983), and two cases adjudicating federal law claims: Brill v. Burlington Northern, Inc., 590 F. Supp. 893 (D. Del. 1984) and the instant case.

respondents' concern over the potential for numerous additional suits led them to make the improper ex parte stipulation to class status in Delaware Chancery Court. Clearly, it is state court adjudication which poses the greatest risk of inconsistent and constitutionally defective results because without federal control and uniform regulation of tender offer misconduct such as that at issue here, inconsistent state action will almost certainly result.

II.

RESPONDENTS MISCONSTRUE §14(e)

Respondents' central point is that deception must be an element of every cause of action brought under the Williams Act because §10(b) (codified at 15 U.S.C. 78j (b)(1983)) has the same "generic language" as §14(e) RB 31. Respondents do not attempt to account for

the obvious, actual differences in language or scope of application between these two sections, or offer any reasonable explanation sufficient for the Court to override the clear language of the statute. In the absence of any evidence to the contrary, Congress must be presumed, to have purposefully selected the terms "...fraudulent, deceptive, or manipulative " in enacting §14(e) and respondents offer no reason[10] to explain why Congress actually used this language if it really meant to require deception as

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[10]Respondents assert that the mere placement of the terms "...fraudulent, deceptive, or manipulative" in series means that deception is a required element under all three categories of misconduct. RB 30. This argument ignores the Court's teaching that a clause containing "or" is to be construed as a separate and additional requirement. See United States v. Naftalin, 441 U.S. 768, 774 (1979).

an essential element under every subdivision of §14(e).

As we have shown in our main brief, respondents' proposed construction makes no logical sense. Congress intended the Williams Act to protect the procedural fairness of the tender offer process. In drafting §14(e), Congress not only mandated full disclosure, but also specifically proscribed any fraudulent, deceptive or manipulative acts committed in connection with a tender offer. The plain language of the statute bars any act or practice which has the effect of frustrating the right of target investors to exercise an informed choice in the tender of their shares. Edgar v. MITE Corp., 457 U.S. 624, 634 (1982).

To read into the statute a requirement of deception as an essential element

of any fraudulent or manipulative act would defeat the very purpose of §14(e) by condoning fraud and manipulation in the tender offer process as long as disclosure is made. This construction would deprive target company shareholders of the free auction market for their shares that Congress intended to establish under the Williams Act, and permit target management and/or the bidder to reap ill-gotten gains with total impunity as long as the wrongdoing is disclosed. We submit that such a construction of §14(e) is contrary to the plain language of the statute and Congressional intent.

Respondents contend that the construction of the term "manipulative" under §10(b) is fully applicable to claims brought under §14(e) (RB 24), citing authorities decided under §10b be-

ginning with the seminal case of Sante Fe Industries, Inc. v. Green, 430 U.S. 462 (1977).[11] Petitioner submits that the manipulation barred by §10(b) is not the same type of manipulation prohibited by §14(e)(See PB 39). This Court has long recognized that the same term used in different sections of the securities laws may have different meanings. A merger, for example, is not a "sale" under §16(b), Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 600 (1973), though it is a "sale" under §10(b), SEC v. National Securities Inc., 393 U.S. 453, 467 (1969).

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[11]Although respondents quote much of the Court's language in Santa Fe, they fail to note the Court's statement that "...non-disclosure is usually essential to the success of a manipulative scheme" 430 U.S. at 477 (emphasis added). The facts at bar demonstrate how a manipulative scheme can succeed despite disclosure.

Logic dictates that the term "manipulative devices" under §10(b) has a different meaning than "manipulative acts" under §14(e). See SEC v. National Securities, Inc., 393 U.S. 453, 468 (1969); Note, Mobil Corp. v. Marathon Oil Co. - The Decision and Its Implications for Future Tender Offers, 7 Corp. L. Rev. 233, 238 (1984). In §10(b), Congress was concerned with the integrity of the trading process to insure that the buyer and the seller would be able to freely sell their shares in the market. In §14(e), on the other hand, Congress sought to ensure the procedural fairness of the tender offer process by mandating full disclosure and preventing the balance from being tipped in favor of either management or the bidder so that target company shareholders would be able to freely

exercise their choices. Full disclosure alone, cannot vindicate the policies of the Williams Act, since shareholders of the target company are not always free to tender their shares to another bidder especially where, as here, the manipulation thwarted competitive bids.

Respondents' arguments on the fraud issue are even less persuasive. It is clear from the cases cited in petitioner's main brief (PB 33-36), that fraud does not require deception or nondisclosure as an essential element to be actionable under §14(e) of the Williams Act. Although respondents do cite five dictionary definitions of fraud (RB 28), they do not inform the Court that the Webster's Third New International Dictionary 904 (1981) cited by them also defines fraud as including "...an act...by which one person obtains an ad-

vantage against conscience over another or which equity or public policy forbids as being prejudicial to another..."

This Court has long recognized that fraudulent conduct includes not only deception, but also conduct that involves a breach of legal or equitable duty, trust or confidence, especially where fiduciaries engage in deliberate and egregious breaches of the duty of loyalty by taking undue and unconscientious advantage of another for personal gain. See Moore v. Crawford, 130 U.S. 122, 128 (1889). This definition was approved again by the Court in SEC v. Capital Gains Bureau, 375 U.S. 180, 194 (1963). Indeed, the Court has gone so far as to state that the securities laws were designed to promote business ethics. United States v. Naftalin, 441 U.S. 768, 775 (1979).

III.
RESPONDENTS' MISCONDUCT VIOLATES §14(e)

The courts below never considered whether respondents' misconduct violated §14(e) in the absence of deception because petitioner's claims were dismissed on the pleadings and prior to discovery. See JA 21. We submit that respondent's misconduct constituted fraudulent or manipulative acts or practices in clear violation of the Williams Act, and petitioner should be given the opportunity to establish these violations of §14(e) upon a full record.

In Edgar v. MITE Corp., 457 U.S. 624 (1982), this Court concluded that Congress enacted the Williams Act "...to protect the investor not only by furnishing him with the necessary

information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." Id. at 634. In the case at bar, target management and the bidder joined forces in a deliberate and collusive scheme to deprive target company shareholders, such as petitioner, of their right to reap the benefits of their informed choice. Despite respondents' characterization of this collusive scheme as mere "...ordinary corporate activity..." (RB 41) it is clear that the acts committed by the respondents were deliberate, knowing and intentional violations of the procedural protections afforded to target company investors by the Williams Act. The facts at bar serve to underscore the pressing need for the Court to construe the Williams Act to

reach such deliberate misconduct, especially where, as here, target management and one bidder pool their resources to deprive target investors of any realistic choice in the tender of their shares.

IV.
SOUND POLICY CONSIDERATIONS SUPPORT THE VIEW THAT §14(e) PROHIBITS THE MISCONDUCT AT BAR

Despite respondents' best efforts to obscure the true and substantial policy considerations at stake in this case (RB 38), it is clear that there are strong policy arguments to support the application of §14(e) to the misconduct at bar. As we have already noted in our main brief, the primary purpose of the Williams Act was to provide a procedural framework to protect public shareholders of the target company, who would otherwise be at the mercy of target

management and the bidder, by ensuring that investors have the fairest possible opportunity to make their own investment decisions (PB 25).

In the case at bar, petitioner, like other similarly situated shareholders of El Paso, made her own investment decision by tendering her shares in the December offer. It was only after target company investors had actually tendered their shares and the December offer was fully subscribed that respondents entered into secret negotiations to prevent target shareholders from realizing the fruits of their informed choice. Certainly, the mere fact that the respondents disclosed this wrongdoing as a fait accompli cannot alter the reality that target investors were treated as "mere pawns" and left with no realistic alternative but to

succumb to respondents' collusive scheme, despite disclosure.

Respondents argue that petitioner's reading of §14(e) would require the federal courts to intrude deeply into established state policies of corporate regulation (RB 38). Clearly this is not the case. State corporation law is concerned primarily with the internal structure, organization and management of corporations, and, as this Court recently stated in Edgar v. MITE Corp., 457 U.S. 624, 645 (1982), "[t]ender offers...do not themselves implicate the internal affairs of the target company." In enacting the Williams Act, Congress was aware that tender offers are often made on a nationwide basis and that any effective regulation of tender offer misconduct would have to be based upon

uniform national standards.[12] Congress drafted §14(e) to expressly bar any conduct which could tip the balance to one or the other side. Thus, it prohibited any fraudulent, deceptive, or manipulative acts committed in connection with a tender offer, and respondents misconduct at bar clearly falls within the §14(e) prohibitions.

Respondents argue that federal court adjudication of tender offer misconduct would not "...provide any greater consistency" or "...prove any more efficacious..." than state court adjudication. (RB 35). Respondents conveniently ignore

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[12]The business judgment rule as applied in many jurisdictions is not an effective tool in the regulation of tender offer misconduct. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied 454 U.S. 1092 (1981).

the elementary principle that state courts do not have the authority to adjudicate violations of §14(e), and it was Congress that specifically empowered the federal courts to bar the misconduct at issue here. Secondly, it is clearly state court adjudication of tender offer misconduct that poses the greatest risk of inconsistent and conflicting results because each state court is free to apply the laws of its own state which may or may not be consistent with the laws of another state having similar jurisdiction over the tender offer.[13]

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[13]There is also the substantial question whether any one state court has the authority to adjudicate a nationwide class action suit where the only jurisdictional basis is the mere presence of one or more of the parties within the state. This issue is currently before the Court in Phillips Petroleum v. Shutts (No. 84-233).

Moreover, the possibility that several different states may be called upon to judge the legality of the same tender offer misconduct can only promote delay and increase confusion.[14] A uniform federal standard, on the other hand, would remove this uncertainty and permit all tender offer participants to conform their conduct to a single, consistent rule.

As a final policy consideration, it must be noted that cash tender offers have become the preferred method for achieving a change in corporate control,

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[14]Compare Panter v. Marshall Field & Co., 646 F.2d 271 (7th Cir. 1981), cert. denied 454 U.S. 1092 (1981) with the recently reported state court decision in Data Probe, Inc. v. CRC Information Systems, (192 N.Y.L.J. No. 123 (1984) at page 7., col. 2) a copy of which is appended to this brief at A1 through A11). (different standards of "business judgment").

and as tender offers have become more commonplace, both the bidder and target management have employed many questionable tactics to protect their own interests. If respondents are permitted to prevail in this appeal, the Court would be sending an unmistakable signal to corporate management that misconduct in the tender offer context will be tolerated and even condoned under federal law, no matter how egregious, so long as disclosure is made to the shareholders. Such a message can only serve to encourage rather than curtail fraudulent and manipulative acts like those at issue here, which could severely undermine public confidence in the takeover process and discourage investing in corporate securities. It is clear that Congress intended

no such result, and the Williams Act could hardly perform its intended function if corporate wrongdoers like respondents are permitted to reap the rewards of their misconduct in blatant disregard of federal law.

CONCLUSION

The statutory language of §14(e), Congressional intent, logic and sound policy considerations require that the judgments of the courts below be reversed.

Respectfully submitted,

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Appendix
A-1

NEW YORK LAW JOURNAL
Friday, December 28, 1984
Reported at page 7, col 2.
Justice Wright

DATA PROBE, INC., v. CRC INFORMATION SYSTEMS Under date of June 20, 1984, an order was made granting to the defendants a temporary injunction, among other things enjoining the plaintiffs from amending the By-Laws of Datatab, or its corporate charger and further enjoining the sale of any of Datatab's material assets, preventing its merger with any other entity, its consolidation or reorganization and from entering into any contract purporting to bind Datatab for a period in excess of one year. Also restrained was the transfer of any Datatab funds to either of its co-plaintiffs, as well as the diversion of any of Datatab's business to its co-plaintiffs or affiliates. The injunctive mandate also embraced any transfer of Datatab employees and the making of any contracts between the plaintiffs.

On the 13th, 14th, 15th, 19th and 21st days of November 1984, a plenary trial of all of the conflicting issues between the parties was held. Plaintiffs sued for a declaratory judgment holding that an option granted by Datatab, Inc. to the defendant CRC Acquisition Corp. is invalid. The claim is made, among other things, that Datatab former directors improperly entered into an option agreement dated July 1, 1983. The agreement conferred upon CRC the right to purchase "any or all" of Datatab's shares at a price of $1.40 per share.

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The agreement was not a product of Datatab's shareholders, but the consequence of a directors' decision in managing the affair of a publicly owned corporation. In rather dramatic language, plaintiff counsel says that the dispute brings into focus the problem of excessive director conduct that usurps "the basic right of shareholders to control corporate destiny." Defendants, eschewing the imponderables of corporate karma and its response to la forza del destino, simply say that the crux of the differences between the parties is the validity of the option.

The directors who authorized the option no longer dictate Datatab's policies. Plaintiffs assert that the former directors were motivated by the doubtful morality of self-interest and that they granted the option as part of a plot and stratagem to protect their employment, in the event that CRC elected to exercise the option and thus take whole sale control of Datatab. In short, the blunt accusation is made that Datatab's former directors breached their fiduciary allegiance to Datatab.

Defendants, on the other hand, see the option as a routine product of business judgment, based upon reasons that would preserve Datatab, then losing money. Exercise of the option, defendants say, would allow revitalization of Datatab's sagging fortunes.

The principal thrust of the preliminary injunction was to preserve the status quo and, on the theory that the options's integrity had not then been impugned and nothing should be done to impair whatev-

er value it might have. Nothing in the settled order defining the parameters of the preliminary injunction tolled the expiration date of the option, or the time within which it had to be exercised.

Plaintiffs originally perceived federal issues in their option quarrel and they attacked its validity in the United States District Court for the Southern District of New York. The court there found that the option was invalid, basically, because the shareholders had been deprived of having placed before them a further competing tender offer and had no opportunity "to decide without management's overriding control," or to make an informed choice or, indeed, any choice. (Dataprobe Acquisition Corp. v. Datatab, Inc., 568 F. Supp. 1538, 1561-1562.)

The U.S. Court of Appeals, Second Circuit, reversed the District Court, ruling, in effect, that the dispute was essentially one for State jurisdiction and not a federal issue (722 F. 2d 1 [1983]; cert. den.).

The option agreement is dated July 1, 1983 and invested CRC with an option to purchase from Datatab, Inc. 1,211,045 shares of its authorized and unissued common stock; 85,119 shares of Datatab's treasury stock and 111,510 shares of its authorized and unissued shares of preferred stock, all at par value $1.00 per share.. After, a competing and larger offer was made by Data Probe. Later, CRC increased its offer to $1.40 per share.

Judge Abraham Sofaer's ruling that the option was invalid remained in effect until the United States Court of Appeals is-

sued its mandate to the District Court. On November 30, 1983, CRC, option in hand, sought to exercise it to the extent of 1,000 shares. Since, as of that date, the ruling of Judge Sofaer was still in effect, Datatab rejected the attempt by CRC. Data Probe, the principal plaintiff in the Federal Court action and the loser in the Court of Appeals, sought a stay of the Court of Appeals reversal mandate and a stay was granted to permit Data Probe an opportunity to petition for certiorari. In February, 1984, the United States Supreme Court denied certiorari. Thus, CRC was then in a position to exercise the option within its life-span.

For whatever reason, CRC did not seize and exercise the option. By its terms, the option expired as of July 1, 1984.

By reason of the described circumstances and quite apart from any substantive finding in this court that the option was invalid, plaintiffs argue that the option issue is moot and rendered so by the passage of time without its proper exercise.

The defendants argue that the rejection of the attempt to purchase 1,000 shares of Datatab under the option agreement was never explained to CRC. The president of CRC, Alvin Steinhart, testified that the next day after Datatab rejected the tender of the CRC check in the sum of $1,400 for the purchase of 1,000 shares, plaintiffs announced the present action to have the option declared invalid. The rejection, and the commencement of this action, Mr.

Steinhart said, persuaded him to conclude that any further tender or attempt to exercise the option would be a vain and futile act—an empty gesture not required. Mr. Steinhart further swore that had he believed the option would have been honored, he would have made his tender for approximately 1,400,000 shares. He also said that, at the time he made his tender for just 1,000 shares, he told Datatab's officers that his tender was only a first one and that he was prepared to make a further tender, should the first one be honored. Since no one from Datatab ever told him that the option would be honored, he appears to have concluded that it would not be honored.

In an effort to demonstrate that his willingness to go all the way with the option was buttressed by genuine fiscal ability, Mr. Steinhart pointed to two letters fron National Westminster Bank, dated, respectively, March 11, 1983 and June 28, 1984 (both within the option period). The March 11th letter advised that the Bank "will hold available a $2,000,000 revolving line of credit" under specified conditions. The June 28, 1984 letter noted the Bank's approval, "subject to conditions precedent," of certain credit facilities, "for the purpose of the Borrower exercising its option . . . to purchase approximately 2/3 of the capital stock of Datatab, Inc."

The March 11, 1983, "commitment" was subject to several conditions, one of which was that CRC provide "documentation satisfactory to [the Bank] and [its] coun-

sel" that a "legally valid and enforceable tender offer has been accepted by the stockholders of Datatab, Inc." The evidence revealed and produced at the trial demonstrates that that condition was never satisfied.

The June 28, 1983 letter provides that "There shall be no litigation pending or threatened with respect to the Option." It concludes with the words that "The foregoing is not and shall not be deemed a binding agreement by the Bank to make the loans pursuant to the credit facilities." There is, then, no evidentiary support for any claim that CRC was ready, willing and able to exercise the option at any time. The litigation itself appears to bulk large as a factor obstructing the availability of needed funds to exercise the option. If, in fact, CRC was unable to exercise the option because of a lack of money, any, other reasons for not having exercised it mean little.

It would seem that there is little or no reason to pursue the declaratory judgment theme of invalidity of the option, if that subject has been rendered moot by the option's expiration. The evidence fully justifies the conclusion that, since the option expired by its own terms, through the passage of time without any attempt to exercise it while it remained in effect, the validity of the option is moot.

On the other hand, it would seem to be judicial oversight to ignore the evidence produced in support of invalidity. It is clear that plaintiffs here, hedged their position and, if one theory did not carry the

day, they wished to have a fall-back position, to wit, that whether or not the option issue is moot, it was an invalid exercise of directorial power. However, in view of the elaborate and in-depth discussion provided by District Judge Sofaer, that appears not to differ in any meaningful sense from the evidence produced here, a conclusion of invalidity cannot be avoided.

It is difficult to escape the view that the former directors of Datatab had established an extremely cozy relationship with CRC. Such intimacy between a union and management is often called a "sweetheart" relationship. It appears that the former directors were anxious to lock out any other tender offer, no matter how low CRC's might be. It further appears that they had personal interests to protect and further. That their innocence is a proper target for suspicion is found in the circumstance that their own counsel warned them about the vulnerability of the option and the employment contracts they had negotiated in connection with the option agreement. Alert to the possibility of being defendants in a law suit, the directors then insisted upon indemnification agreements from CRC.

At best, all of these circumstances demonstrate that the former directors may have had grave doubts about what may loosely be described as their "business judgment." Their doubt seems well placed. Both the employment contracts and the indemnification warranties given by CRC confirm the existence of personal interests by the directors. Despite Data-

tab's fiscal ailments, CRC was a passionate and persistent wooer. Not only would CRC lend $200,000 to Datatab, but would only charge 5% interest--this, at a time when Datatab had a line of credit with the Slavenberg frim at 4% over the prime rate of interest.

The negotiated relationship between CRC and Datatab was such, that one way or another, CRC would win control of Datatab. If it purchased two-thirds of Datatab's shares, it would have control. If the shareholders rejected the $1.40 bid for merger, CRC could still exercise its option and gain control. Once CRC had control of two-thirds of Datatab's shares, it could easily propose a merger to the remaining stockholders and simply vote its shares in favor of the proposal. Sanford Adams, at the time, the president and a director of Datatab (Steinhart had been one of its founders), testified that he was concerned about the legality of the option.

The defendants were simply unable to show that the option agreement served the best interests of the corporation and its shareholders, although the circumstances here squarely cast that burden of proof upon them (cf. Pepper v. Litton, 308 U.S. 295, 306-307; sec. 713 (a)(3), N.Y. Bus. Corp. Law.) A dark shadow was cast across the conduct of the Datatab directors and their good faith. Their faith appears to have been self-directed, and marked by a zealous devotion to their private interests. The argument that the former directors could find safe haven in the business judgment rule, is without merit here.

Corporate directors owe a strict fidelity to the obligations of their office. Good faith is the key to formation of a business judgment. That judgment must be free of taint by personal gain. This is in keeping

with the fiduciary relationship directors have with their corporations (Matter of Vogel [Lewis], 25 App. Div. 2d 212, affd. 19 N.Y. 2d 589.) Thus, directors owe an undivided loyalty and are not permitted to derive a personal profit at the expense of the corporation (Schacter v. Ketek Electric Corp., 96 App. Div. 2d 1038, 1039.)

In view of the employment contracts here negotiated and the indemnification contracts, retreat behid the business judgment rule has been barred.

"The busines judgment rule does not foreclose inquiry by the courts into the disinterested independence of . . . members of the board. . . . Indeed the rule shields the deliberation and conclusions of the chosen representatives of the board only if they possess a disinterested independence and do not stand in a dual relation which prevents an unprejudiced exercise of judgment."

(Auerbach v. Bennett, 47 N.Y. 2d 619, 632.)

Clearly, here, the exercise of judgment was deeply influenced by certain tie-in arrangements that were geared to the protection of the directors's jobs, while offering them personal protection from liability, in the event of the very lawsuit they expected by reason of their conduct.

Business judgment presumes action based upn analysis of circumstances and the best interests of the corporation, i.e., its shareholders. It is only that kind of discretion that is protected.

"Discretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing."

(Panama Refining Co. v. Ryan, 293 U.S. 388, 440 [dissenting opinion, Cardozo, J.])

Plaintiff asks for counsel fees, general and punitive damages. Such awards are provided for in various sections of the Business Corporation Law in the cases of derivative stockholders actions. No section of that law appears to cover or authorize the kinds of award prayed for by plaintiffs and no evidence was offered during the trial to support such awards. The struggle here is between corporations and the principal thrust of the pleadings and the evidence was that neither side had an adequate remedy at law, that is, in terms of money damages and the equitable intervention of equity was sought.

It is now too well settled to need extensive discussion and citations, that counsel fees are an incident of litigation, absent some statutory authorization for counsel fees and expenses, or some contractual engagement. Compare Neri v. Retail Marine Corp. 30 N.Y. 2d 393. However, plaintiffs seek damages flowing from the condemned lock-up option, as well as punitive damages by reason of the blatantly improper conduct of Datatab's former directors, acting in concert with the CRC defendants. Accordingly, there must be an

assessment hearing to determine the amount of damages to which plaintiffs are entitled and whether or not the circumstances justify the imposition, as well, of punitive damages.

The temporary injunction is dissolved and vacated.

The conterclaims advanced by the defendants must be dismissed, in view of the holding here in favor of the plaintiffs, to the extent indicated. A copy of this decision is directed to be served forthwith upon the Calendar Clerk, who is orderd to place this matter at the head of the calendar for an assessment of damages. A single judgment shall be entered, with entry to abide conclusions of the assessment hearing.